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# CONGRESSIONAL PREROGATIVES, THE CONSTITUTION AND A NATIONAL COURT OF APPEALS

*By Kevin L. Domecus\**

## Introduction

Reform of the federal judiciary historically has been a long and arduous process, marked by slow recognition of the need for change, endless debates on the wisdom of any proposals, and such interminable delays in obtaining reform that any changes resemble emergency relief. The "caseload crisis"<sup>1</sup> of recent years may mark the beginning of yet another episode in that lengthy process. As federal court filings at every level continue to increase,<sup>2</sup> the judicial system shows greater symptoms of strain. Recent years have witnessed the call for abolition of all mandatory appeals to the Supreme Court,<sup>3</sup> a larger role for judicial alternatives,<sup>4</sup> and division of the existing eleven circuit courts of appeals<sup>5</sup> into new circuits of smaller geographic area, but the most structurally significant proposals are those calling for a National Court of Appeals (NCA), which is intended to be an appellate level interposed between the present circuit courts of appeals and the Supreme Court.

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\* Member, second-year class.

1. See FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT] and U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as HRUSKA REPORT].

2. See notes 120-26 and accompanying text *infra*.

3. The abolition of direct Supreme Court appeal from all three judge court decisions was accomplished by recent legislation which preserved such an appeal only in cases challenging the constitutionality of the apportionment of legislative districts. On Aug. 12, 1976, Congress passed Public Law 94-381, repealing 28 U.S.C. §§ 2281 and 2282 and amending §§ 2284 and 2403, abolishing most three-judge courts and thus direct appeals from those courts to the Supreme Court. See 28 U.S.C.A. §§ 2281, 2282, 2284, 2403 (1977).

4. See, e.g., Puro, *United States Magistrates: A New Federal Judicial Officer*, 2 JUST. SYS. J. 141 (1976); Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475 (1978).

5. See, e.g., *Commission Recommends Splitting Fifth and Ninth Circuits to Create Two New Federal Appellate Circuits*, 60 A.B.A.J. 209 (1974); Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 SW. L.J. 839 (1976).

The very idea of an NCA raises numerous policy questions, but the sole issue for this note is whether implementation of the court would be a constitutionally valid exercise of congressional power.

While a National Court of Appeals has been discussed in various forms since 1971,<sup>6</sup> there have been two recent major proposals, one from the Federal Judicial Center Study Group on the Caseload of the Supreme Court (the Freund Study Group) and the other from the Commission on Revision of the Federal Court Appellate System (the Hruska Commission). The Freund proposals were extensively criticized,<sup>7</sup> and their wide-ranging suggestions have served as little more than a basis for discussion. The Hruska Commission's proposal for a National Court was much less controversial, and although it too has been criticized,<sup>8</sup> versions of the proposal are currently before the judici-

6. See, e.g., FREUND REPORT, *supra* note 1, at 18-24; HRUSKA REPORT, *supra* note 1, at 5-39; Griswold, *Rationing Justice—the Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1974) [hereinafter cited as Griswold]; Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881 (1975).

7. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 50-53 (1973); Alsop, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974) [hereinafter cited as Black]; Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised"*, 59 A.B.A.J. 835 (1973); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973) [hereinafter cited as Brennan I]; Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973) [hereinafter cited as Gressman I]; Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14; Meredith, *The Supreme Court of the United States and the Proposed National Court of Appeals*, 29 J. MO. B. 441 (1973); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973) [hereinafter cited as Poe, Schmidt & Whalen]; Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974); Warren, *A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court*, 20 LOY. L. REV. 221 (1974); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974) [hereinafter cited as Warren I]; Warren, *The Proposed New "National Court of Appeals"*, 28 REC. A. B. N.Y. 627 (1973); *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposals*, 59 A.B.A.J. 721 (1973) [hereinafter cited as Warren & Burger]; Note, *National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973); Comment, *National Court of Appeals: Freund or Foe*, 21 LOY. L. REV. 171 (1975); Note, *The National Court of Appeals: A Constitutional "Inferior Court"?*, 72 MICH. L. REV. 290 (1973) [hereinafter cited as *National Court*]; Note, *Proposed National Court of Appeals: A Critical Analysis*, 27 RUTGERS L. REV. 904 (1974). But see A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* (1973) [hereinafter cited as A. BICKEL]; Warren & Burger, *supra*, at 724-30; Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973) [hereinafter cited as Freund I]; Freund, *National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974) [hereinafter cited as Freund II]; Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Note, *National Court of Appeals: A Qualified Concurrence*, 62 GEO. L.J. 881 (1974).

8. See *Hearings before the Commission on Revision of the Federal Court Appellate System: Second Phase*, 2 vols. (1975) [hereinafter cited as *Hearings I* and *Hearings II*] (Remarks of Bell, *Hearings II*, *supra* at 677; remarks of Friendly, *supra* at 1311; remarks of Goldberg, *supra* at 1317; remarks of Gressman, *supra* at 1319); Alsop, *Reservations on the Proposal of the Hruska Commis-*

ary committees of both houses of Congress.<sup>9</sup>

There are three substantial constitutional issues that present significant threshold problems to this type of structural reform. The initial consideration is whether the implementation of a National Court of Appeals would violate the constitutional proviso for "one supreme Court." The second issue arises from the congressional power to create "inferior" courts, focusing on whether a National Court of Appeals would be sufficiently inferior to fall within the scope of that authority. The final question is whether constitutional power given to Congress to make "exceptions and regulations" to federal court jurisdiction includes the power to create an NCA.

Many commentators have resolved any one or all of these problems in the negative, arguing that any denial of ultimate Supreme Court review would either violate the "oneness" of the Supreme Court<sup>10</sup> or exceed congressional authority to create only "inferior" courts.<sup>11</sup> The critics also claim that congressional authority under the exceptions and regulations clause of article III is not plenary and cannot be invoked to restrict any broad, traditional Supreme Court functions such as the right to review all cases arising in the federal system.<sup>12</sup>

When viewed against the complete history of the federal court system, however, these constitutional criticisms seem rather provincial, shaped more by recently developed conceptions about the function of

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sion to Establish a National Court of Appeals, 7 U. TOL. L. REV. 431 (1976); Feinberg, *National Court of Appeals*, 42 BROOKLYN L. REV. 580 (1976); Haworth, *supra* note 5, at 840; Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 U.C.L.A. L. REV. 580 (1976) [hereinafter cited as Owens]; Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976). But see Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A.J. 819 (1975); Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286 (1975); Levin, *Do We Need a New National Court?*, 12 TRIAL 32 (1976); Rosenberg, *Enlarging the Federal Court's Capacity to Settle the National Law*, 10 GONZ. L. REV. 709 (1975).

9. H.R. 3969, 95th Cong., 1st Sess. (1976); S. 3423, 94th Cong., 2d Sess. (1976).

10. See, e.g., Black, *supra* note 7, at 885-86; Gressman I, *supra* note 7, at 959-64; Poe, Schmidt & Whalen, *supra* note 7, at 855.

11. *National Court*, *supra* note 7, at 304-05.

12. See *Hearings II*, *supra* note 8, at 1319 (remarks of Gressman); Gressman I, *supra* note 7, at 966-68; *National Court*, *supra* note 7, at 305-08. See generally Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review and Writ Dismissals*, 26 VAND. L. REV. 895 (1973) [hereinafter cited as Blumstein]; Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) [hereinafter cited as Hart]; Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 KAN. L. REV. 16 (1956) [hereinafter cited as Lenoir]; Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) [hereinafter cited as Ratner]. See also Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 259-61 (1973) [hereinafter cited as Van Alstyne].

the Supreme Court than by the original Supreme Court role in the governmental plan. The judicial activism of the last thirty years may have created a notion that the Supreme Court must see every case, vindicate every injustice, correct every questionable decision and write every final opinion, a conclusion without historical support or even current validity. Yet, constitutional objections to a National Court of Appeals arguably are premised more on preserving an idyllic role for the Supreme Court than on valid constitutional principles.

Separating the proper role of the Supreme Court from the various popular conceptions regarding its functions requires a thorough historical analysis of both the original purpose and operation of the federal courts and their eventual historical development. Such an analysis will demonstrate the potential for change and accommodation that has become an enduring characteristic of the federal court system, a feature that has not only provided impetus for past reforms but which also will enable proposed structures such as a National Court of Appeals to pass constitutional muster. Part I of this note examines the inception of the federal court system and its growth and reform, starting with the framing of the Constitution and progressing through the major Judiciary Acts and various other court reforms. This analysis provides a more accurate picture of the original design of the court system. Part II describes the Freund and Hruska plans for a National Court of Appeals, and Part III discusses each specific constitutional question raised by the creation of a National Court.

The historic pattern of slow response to the need for judicial reform will probably never be changed, and such a deliberate approach may be a wise course when dealing with such a well-entrenched governmental branch. The purpose of this note is to show that the current pattern should not be encumbered by constitutional objections to structural changes that are based upon misconceptions of the role of the federal appellate court system. The federal courts were designed to meet the contemporary needs of a changing population, and these twentieth-century needs should not be frustrated by a restrictive reading of the Constitution that refuses to consider both pragmatic concerns and historical developments.

## I. Growth And Reform Of The Federal Courts

### A. The Inception of the Constitution

The Constitution, in article III, provides the basic framework of the federal judiciary.<sup>13</sup> Section One vests the judicial power in "one supreme Court" and other inferior courts as Congress sees fit to establish, and provides for judicial tenure and compensation. Section Two sets forth jurisdictional guidelines, defining the Supreme Court's original and appellate jurisdiction and giving Congress the power to make exceptions and regulations to the latter. The article is markedly bereft of any detail regarding the structure or function of the courts.

The constitutional skeleton acquires additional, albeit limited, shape through an examination of the records of both the constitutional convention and the state ratifying conventions.<sup>14</sup> The constitutional convention is of primary importance as the occasion where all of the language was ostensibly debated before it was drafted. However, as stated by Max Farrand, a primary chronicler of the convention, "to one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention."<sup>15</sup> All the plans calling for a judicial department contained a provision for a Supreme Court,<sup>16</sup> but the specific language calling for *one* High Court and other *inferior* courts, later a source of controversy surrounding NCA proposals, were passed without substantial debate. However, the exceptions and regulations clause was revised in both the committee on detail and the convention at large, and the significance of these changes has been the subject of considerable comment. One critic has concluded that the framers intended to limit the congressional power to alter the appellate jurisdiction.<sup>17</sup> However, the convention as a whole

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13. The relevant portions of article III read as follows:

§ 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

§ 2, cl. 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.

14. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols.) (2d ed. J. Elliot 1881) [hereinafter cited as ELLIOT'S DEBATES]; THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (6 vols.) (M. Farrand ed. 1937) [hereinafter cited as FARRAND].

15. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913).

16. See 1 FARRAND, *supra* note 14, at 21, 244, 292; 2 *id.* at 432, 3 *id.* at 600.

17. *Gressman I*, *supra* note 7, at 964-68; *Hearings II*, *supra* note 8, at 1321 (remarks of Gressman).

never debated the merits of an exceptions and regulations clause<sup>18</sup> because none had been included in the original plans for a judiciary.<sup>19</sup> The exceptions clause was not proposed until the meeting of the committee on detail, a group charged with writing the precise constitutional language.<sup>20</sup> While specific details as to events in that committee are not clear, its members did reject one clause which provided that "judicial power shall be exercised in such manner as the legislature shall direct."<sup>21</sup> In its place, the committee substituted the present language, allowing that "the supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions and under such Regulations as the Congress shall make."<sup>22</sup> The committee then added language to follow the exceptions and regulations clause which provided that "[t]he Legislature may assign any part of the [court's original or appellate] jurisdiction above mentioned . . . in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time."<sup>23</sup> However, when article III was voted on by the whole convention, the delegates rejected that latter language regarding jurisdictional assignment, leaving the present exceptions clause to stand by itself.<sup>24</sup>

The Federalist Papers,<sup>25</sup> while representing the best example of 1780 constitutional philosophy, provide little assistance in defining precise terms in article III. Alexander Hamilton, the author of the relevant articles, sought to assure the states that their interests would not be abused by an unbridled federal judiciary.<sup>26</sup> Hamilton thus guaranteed that the Supreme Court's appellate jurisdiction, both as to law and as to fact, would not emasculate the finality of state court jury verdicts<sup>27</sup> and argued at length that inferior federal courts were a better mechanism

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18. See J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, in 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 240 (P. Freund ed. 1971); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

19. See 2 FARRAND, *supra* note 14, at 146-47, 157, 172-73, 186, 424-25, 430-31, 434, 437; 4 *id.* at 47-48. See generally *Gressman I*, *supra* note 7, at 966; HART & WECHSLER, *supra* note 18, at 20.

20. 2 FARRAND, *supra* note 14, at 146-47.

21. *Id.* at 425.

22. *Id.* at 424-25, 430-31, 434, 437.

23. *Id.* at 186-87.

24. *Id.* at 430-32.

25. THE FEDERALIST NOS. 78-83 (H. Lodge ed. 1888) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

26. See *id.* No. 81, at 506-09; No. 82, at 512-13.

27. *Id.* No. 81, at 509-10.

for federal claims than state courts.<sup>28</sup> Hamilton did refer to the inferior courts as being subordinate to the Supreme Court,<sup>29</sup> but did not give any details regarding what such subordinancy would actually entail.

The proposals regarding a federal judiciary were not a major concern of the various state ratifying conventions. The major points at issue, lack of the guarantee of a jury trial in civil cases, appellate jurisdiction both as to law and fact, and diversity jurisdiction, shed little light on the motivations underlying article III terminology.<sup>30</sup>

One significant inference from the state conventions comes from a debate in Virginia over the wisdom of giving Congress power to create inferior federal courts.<sup>31</sup> Patrick Henry had objected that such a power might eventually lead to a system that undermined the structure of the state courts.<sup>32</sup> Henry preferred that the state courts be utilized as the inferior courts. Edmund Pendleton answered first:

He objects that there is an unlimited power of appointing inferior courts. I refer to that gentleman, whether it would have been proper to limit this power. Could those gentlemen who framed that instrument have extended their ideas to all the necessities of the United States, and seen every case in which it would be necessary to have an inferior tribunal?<sup>33</sup>

John Marshall added: "I own that the power of creating a number of courts is, in my estimation, so far from being a defect, that it seems necessary to the perfection of this system."<sup>34</sup> Although these replies, made only in Virginia by two of the foremost advocates of the Constitution, cannot be accepted as the single absolute embodiment of original intentions, they are significant in their articulation of the forward-looking perspective that pervaded the constitutional conventions.

The search for the original meaning of article III terminology is in many ways a futile exercise. There are hints as to the proper scope of federal jurisdiction, the congressional power to create inferior courts and to make exceptions and regulations to the Supreme Court's appellate jurisdiction, but the context of the debates is very remote from any current controversies. Nevertheless, a general notion of the intended

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28. *Id.* No. 80, at 495; No. 81, at 506-07.

29. *Id.* No. 81, at 505-06.

30. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 14, at 446-47, 519, 521-29, 532-36, 539-46, 549, 551-57, 570-72 (Virginia Convention); 1 *id.* at 322-23, 326 (Massachusetts & New Hampshire Conventions). See generally Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948); HART & WECHSLER, *supra* note 18, at 21-23.

31. See 3 ELLIOT'S DEBATES, *supra* note 14, at 544-53.

32. *Id.* at 539-46.

33. *Id.* at 547.

34. *Id.* at 553.



role of the judicial branch in the governmental system is important and is somewhat more ascertainable than any definitive explanation of constitutional terms. While some of the state convention material does indicate a broad plan for potential court construction,<sup>35</sup> the true intentions of the framers are best gleaned from their own implementation of the judicial machinery.

## B. The Judiciary Act of 1789

The Judiciary Act of 1789<sup>36</sup> has been the single most important judicial legislation ever adopted by Congress. Its provisions were significant in two main respects; first, the 1789 Act set an organizational blueprint for the federal court system which has survived in essence to the present, and second, the Act, enacted shortly after the constitutional convention, provides perhaps the most accurate reflection of the framers' plans for the federal judiciary.<sup>37</sup> The Act established a tri-partite system of federal courts, with the Supreme Court at the top, circuit courts in the middle, and district courts at the bottom.<sup>38</sup> The Supreme Court was composed of one Chief Justice and five associate justices, while the circuit courts, originally numbering three, were each staffed by two Supreme Court justices and one district court judge.<sup>39</sup> This basic system, altered only by increases in the number of districts, the number of circuits and the number of members of the circuit and Supreme Courts, is still in effect today.<sup>40</sup>

The first Judiciary Act did not give the lower courts extensive jurisdiction. The district courts had jurisdiction over admiralty cases,<sup>41</sup> seizures following shipping violations,<sup>42</sup> suits against consuls,<sup>43</sup> suits by the federal government in matters involving less than \$100<sup>44</sup> and some criminal cases.<sup>45</sup> The circuit courts had jurisdiction over all matters triable under federal statutes not exclusively reserved to the district

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35. *Id.* at 547, 553.

36. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

37. The Supreme Court itself has stated that the Act "was passed by the First Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). See generally Warren, *History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 23 (1923) [hereinafter cited as Warren].

38. Act of Sept. 24, 1789, ch. 20, §§ 1-4, 1 Stat. 73-75.

39. *Id.* at §§ 3-4, 1 Stat. 73-75.

40. See notes 54-56 and accompanying text *infra*.

41. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

42. *Id.*

43. *Id.* at § 9, 1 Stat. 73, 77.

44. *Id.*

45. *Id.* at §§ 9, 11, 1 Stat. 73, 76-79.

courts,<sup>46</sup> original jurisdiction in diversity cases<sup>47</sup> and some appellate jurisdiction from the district courts.<sup>48</sup> In the early days of the system, admiralty was the major subject area dealt with in the district courts and diversity of citizenship cases the primary source of business in the circuit courts.<sup>49</sup> The scope of appellate review was limited, and the district and circuit courts were often courts of final jurisdiction.<sup>50</sup>

This limited federal court system was well suited for its time and remained reasonably efficient well into the 1800's, when the beginning of a period of massive growth began to take its toll. The changes made necessary by national expansion eliminated many of the procedural and substantive provisions of the Act of 1789, but the tri-partite structure which was established then remains today. However, apart from the remaining structural similarities, the Act of 1789 is important both because of the broad responsibilities assumed by Congress in forming the courts and the way those responsibilities were exercised. There is no evidence in any of the early congressional deliberations relating to the Act to show that Congress felt at all strictured in its creation of a judicial system.<sup>51</sup> Congress was seemingly exercising powers it deemed unencumbered by any significant constitutional guidelines, and constructed the court system according to its own desires. Specifically, there is no mention in the constitution of a right of access to the Supreme Court or even to a circuit court. Neither do there seem to be any constitutional principles governing the scope of lower court juris-

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46. *Id.* at § 11, 1 Stat. 73, 78-79.

47. *Id.*

48. *Id.* at §§ 21, 22, 1 Stat. 73, 83-85.

49. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 12-13 (1928) [hereinafter cited as F. FRANKFURTER & J. LANDIS]; HART & WECHSLER, *supra* note 18, at 34-35; Surrency, *A History of Federal Courts*, 28 Mo. L. REV. 214, 215-16 (1963) [hereinafter cited as Surrency].

50. HART & WECHSLER, *supra* note 18, at 35. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 13; Warren, *supra* note 37, at 67-68.

51. One peripheral constitutional debate involved the question of inferior federal courts, with the Federalists urging the creation of a separate lower federal court system and the more state-oriented delegates arguing for utilization of the existing state courts for national judicial purposes. That debate, however, did not raise the question of the congressional power to create those courts but only the wisdom of doing so. The major constitutional issue involved the extent of federal jurisdiction. The Federalists argued that the federal judiciary should have full federal question jurisdiction, giving those courts the greatest possible power under the Constitution. The anti-Nationalists, in countering that proposal, urged the state court system as an alternative to the federal courts, necessarily implying little separate federal jurisdiction. The eventual compromise contained an inferior federal court system with a limited jurisdiction, and it was not until 1875 that the Federalist conception of broad jurisdiction was realized, see note 72 *infra*. No constitutional objections were raised against the final legislation. See Warren, *supra* note 37, at 56-58, 62-64, 66-68.

diction.<sup>52</sup> The Supreme Court was given its original jurisdiction by the Constitution, but Congress, acting on its constitutional grant of power to create inferior courts and to make exceptions and regulations to the appellate jurisdiction, filled in the contours.<sup>53</sup>

Aside from the provision for one Supreme Court, there is essentially nothing "constitutional" about the now familiar structure of the federal judiciary. Congress at the very beginning assumed a wide range of responsibility over the judicial branch and acted in a far-reaching manner to set up a federal court system. Subsequent congresses have retained this responsibility, acting at various times to increase the size of the branch by adding new judges or expanding the number of courts,<sup>54</sup> adjusting judicial business by altering the limits of federal court jurisdiction,<sup>55</sup> or even by governing the actual Supreme Court term, as was done in 1803 when Congress eliminated an entire Supreme Court session.<sup>56</sup> Congress thus from a very early day has as-

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52. See Warren, *supra* note 37, at 68. There was some question as to whether Congress possessed as large a degree of power over lower court jurisdiction as it did over Supreme Court appellate jurisdiction, but this was an issue raised more in historical perspective by Warren than one much debated in Congress.

53. There had been a general concern that the Constitution as ratified did not adequately protect the states from the possibility of an unbridled federal judicial system. These feelings initially resulted in a large number of amendments to both the Judiciary Act and later to the wording of article III. Similar sentiments about other constitutional provisions and an uneasiness about the power of the courts resulted ultimately in the passage of the Bill of Rights. In any case, none of the spokesmen in the debates on the Judiciary Act were overly concerned with protecting the role of the courts; on the contrary, it was virtually assumed that Congress could act in a broad fashion to place limitations upon a governmental branch with largely undefined powers. See generally F. FRANKFURTER & J. LANDIS, *supra* note 49, at 11; HART & WECHSLER, *supra* note 18, at 12; Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 520 (1976); Warren, *supra* note 37, at 53-55, 113-116.

54. See, e.g., Act of April 29, 1802, ch. 31, § 4, 2 Stat. 156, 157 (bringing the total number of circuit courts to six); Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420 (adding a seventh circuit); Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209 (adding an eighth and a ninth circuit); Act of Feb. 9, 1893, ch. 74, § 1, 27 Stat. 434 (adding a circuit for the District of Columbia); Act of Feb. 28, 1929, ch. 363, § 116, 45 Stat. 1346 (establishing a Tenth Circuit and completing the present system of eleven circuits). See also Act of February 24, 1807, ch. 16, § 5, 2 Stat. 420 (adding a seventh Supreme Court Justice) and Act of April 10, 1869, ch. 22, § 2, 16 Stat. 44 (creating the office of circuit court judge).

55. See, e.g., Act of April 9, 1866, ch. 31, § 10, 14 Stat. 27, 29 and Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (both of which expanded federal court jurisdiction in civil rights cases); Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (expanding Supreme Court jurisdiction over habeas corpus petitions); Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (providing for writ of error to the Supreme Court in capital crime cases); Act of Feb. 5, 1825, ch. 6, § 5, 4 Stat. 80, 81; Act of April 17, 1828, ch. 29, § 7, 4 Stat. 261, 262; Act of Aug. 14, 1848, ch. 177, § 9, 9 Stat. 323, 327 (giving the Supreme Court jurisdiction over decisions of the highest courts of the Michigan, Arkansas and Oregon territories, respectively).

56. The Judiciary Act had provided two Supreme Court terms per year, and in 1801 Congress changed the schedule to June and December meetings rather than February and August, Act

sumed a near plenary power over the structure of federal courts, and there appears to be no evidence of any constitutional objection to such a legislative prerogative either from the Constitution, the debates surrounding the Act of 1789, or even the federal courts. Congress became more of an architect than a mechanic, setting up a system to meet contemporary needs rather than merely fleshing out a plan already prescribed by the Constitution. As growth of the United States required changes in the various governmental institutions, Congress clung to its role of judicial innovator and continually structured the federal court system to meet current needs.

### C. Expansion and Reform

The 19th century marked the beginning of the gradual process of judicial business wearing down judicial machinery. An examination of congressional action vis-à-vis the courts reveals a struggle to keep the federal judiciary in condition to respond effectively to needs of the times, a struggle in which, on balance, Congress has always seemed to be at least ten years behind. Frankfurter and Landis, in their definitive history of the Supreme Court and its workload, noted that Congress has not always given judicial problems prompt attention, and observed that "legislation concerning judicial organization throughout our history has been a very empiric response to very definite needs."<sup>57</sup> This trend is reflected not only in every major change of the 1800's, but of the 1900's as well. The history of circuit riding is illustrative of the problems surrounding judicial reform. The 1789 Judiciary Act provided for circuit riding by the Supreme Court Justices, who combined with district court judges to hold the circuit court sessions.<sup>58</sup> These ses-

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of February 13, 1801, ch. 4, § 1, 2 Stat. 89. The repealer to that legislation, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132, did not change that schedule, but a bill following, Act of April 29, 1802, ch. 31, § 1, 2 Stat. 156, established one term per year to commence in February. Since the Court had met last in December 1801, and the 1802 statute called for February terms, eliminating what would have otherwise been an upcoming June term, the next meeting of the Supreme Court took place in February of 1803, a gap of fourteen months. The purpose of the legislation was to put off decision on the case of *Marbury v. Madison*, 51 U.S. (1 Cranch) 137 (1803). See generally 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 222-30 (1926) [hereinafter cited as 1 C. WARREN]; L. PFEFFER, *THIS HONORABLE COURT* 76-79 (1965).

57. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 13.

58. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74. See generally P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 7-9 (1973) [hereinafter cited as FISH]; F. FRANKFURTER & J. LANDIS, *supra* note 49, at 14-16, 18-20, 22, 25; HART & WECHSLER, *supra* note 18, at 37-38; 1 C. WARREN, *supra* note 56, at 58-62; Surrency, *supra* note 49, at 221-23. The original circuit courts did not have their own bench because the courts were staffed by a combination of Supreme Court Justices and district court judges. This is to be contrasted with the modern circuit system established in 1891, see notes 84-95 and accompanying text *infra*, that provided for an entirely separate

sions were always held in the various cities of each circuit, and the system's intended benefits included bringing the federal judiciary out to the populace and ingraining in the Justices an appreciation of local law.<sup>59</sup> However, the concurrent growth of territory and population combined with contemporary travel conditions to make circuit riding not only a tremendously taxing physical burden but also an impediment to an effective discharge of justice in either forum.<sup>60</sup> This strain was felt as early as the 1790's, and Congress passed a form of relief in the Act of March 2, 1793<sup>61</sup> which allowed for a rotation system that required only one circuit trip per justice per year. However, due to the increased business at all levels of the federal courts and the spiraling Supreme Court workload, it became apparent that the practice of circuit riding would have to come to an end. Congress, however, establishing an unfortunate pattern, waited eight years before acting to reform the system with the Second Judiciary Act of 1801.<sup>62</sup> Unfortunately, that Act was notorious for some of its other provisions, namely the appointment of "midnight judges"<sup>63</sup> that culminated in the case of *Marbury v. Madison*,<sup>64</sup> and it was repealed after the election of Thomas Jefferson as president in 1802.<sup>65</sup> The Jeffersonians could not ignore the

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bench and a very distinct jurisdiction. The old circuit system, abandoned for all practical purposes many years earlier, was not actually abolished until 1911, Act of March 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

59. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 16-21; 1 C. WARREN, *supra* note 56, at 58; Surrency, *supra* note 49, at 229-30.

60. See generally F. FRANKFURTER & J. LANDIS, *supra* note 49, at 21-22; 1 C. WARREN, *supra* note 56, at 86-88; Surrency, *supra* note 49, at 221-23. Chief Justice John Jay had written President Washington regarding the burdens of the practice as early as 1792, F. FRANKFURTER AND J. LANDIS, *supra* note 49, at 22, and by the 1830's the average distance traveled by a Supreme Court Justice had risen to 2000 miles, with Justice McKinley logging 10,000 miles in one year alone. Surrency, *supra* note 49, at 221.

61. Act of March 2, 1793, ch. 22, 1 Stat. 333.

62. Act of Feb. 13, 1801, ch. 4, § 1, 2 Stat. 89.

63. The term "midnight judges" arose from the Act's controversial judicial appointments, which, being made on the eve of Thomas Jefferson's inauguration, were designed to deprive him of important judicial selections. Other than that controversial provision, the Act contained forward-looking sections regarding circuit riding and circuit organization. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 25, 29-30; Surrency, *supra* note 49, at 219-21.

64. 5 U.S. (1 Cranch) 137 (1803).

65. Act of March 8, 1802, ch. 8, 2 Stat. 132. There was some debate in Congress over the constitutionality of repealing legislation which had already established judgeships and structured the judiciary. The resolution of the dispute over the "midnight judge" legislation was based more on politics than legal theory (only one Jeffersonian voted against repeal), see F. FRANKFURTER & J. LANDIS, *supra* note 49, at 26, n.75, but the debate touched on some interesting constitutional aspects of congressional power in regard to the federal judiciary. Federalist leaders equated repeal with putting the Constitution and courts at the mercy of the legislature, *id.* at 27, but the Senate floor leader denied that Congress even had a duty to create inferior courts, and reasoned that if Congress was free to abolish a court it could abolish the new judgeships of the 1801 Act, *id.* at 26.

circuit riding problem, though, and later in 1802 they passed an act to restrict but not eliminate the practice.<sup>66</sup> Circuit riding was eliminated for all practical purposes in 1869,<sup>67</sup> but not officially terminated until 1891,<sup>68</sup> nearly one hundred years after it first became a serious problem—a practical illustration of the slow congressional response to judicial needs.

Apart from the circuit riding dispute, population growth and expansion of federal regulation and litigation also resulted in increasing business for the federal courts.<sup>69</sup> Despite an increase in the number of circuits and justices, the judicial system was unable to keep abreast of its new business.<sup>70</sup> The escalating workload intensified after the Civil War, when the triumph of national authority and the disputes arising from Reconstruction further taxed the existing system by adding new types of disputes to be litigated in federal courts.<sup>71</sup> In 1875, Congress further compounded the situation by tremendously expanding federal court jurisdiction.<sup>72</sup>

The federal courts from 1789 through the Reconstruction period had become essentially "subsidiary courts" limited to diversity jurisdiction cases.<sup>73</sup> The Act of March 3, 1875,<sup>74</sup> reflecting a tremendous ex-

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The issue was never addressed by the Supreme Court, and Congress was again left in a position of strong authority over the judiciary.

66. Act of April 29, 1802, ch. 31, 2 Stat. 156, *as amended by* Act of March 3, 1803, ch. 40, 2 Stat. 244.

67. Act of April 10, 1869, ch. 22, 16 Stat. 44, 45.

68. The Circuit Court of Appeals Act, Act of March 3, 1891, ch. 517, 26 Stat. 826, by establishing the new circuit courts of appeals, arguably ended circuit riding because of its relegation of the old circuit system to obscurity and its establishment of the separate circuit bench, and Surrency, *supra* note 55, at 234, claims that the practice was abolished more by custom than by statute. *But see* HART & WECHSLER, *supra* note 18, at 41 (arguing that circuit riding ended with the statutory demise of circuit courts in 1911).

69. *See* F. FRANKFURTER & J. LANDIS, *supra* note 49, at 43-51. Out of 173 cases on the Supreme Court docket in 1845, 109 were left undecided at the end of the term that year, *id.* at 51.

70. *See id.* at 60, 69; *see* notes 76-79 and accompanying text *infra*.

71. This swelling of the dockets was due to the growth of the country's business, the assumption of authority over cases heretofore left to state courts, and the extension of the field of federal activity. The great commercial development brings its share of litigation to the courts; booms and panic alike furnish grist for the courts . . . invention occasions many and complicated patent controversies . . . These are items that add greatly to the work of the courts without any enlargement of their jurisdiction.

*Id.* at 60-61.

72. Act of March 3, 1875, ch. 137, 18 Stat. 470. *See generally* F. FRANKFURTER & J. LANDIS, *supra* note 49, at 65; HART & WECHSLER, *supra* note 18, at 39; Surrency, *supra* note 49, at 233. The Act essentially gave the lower federal courts jurisdiction over all suits, subject to a jurisdictional limit of \$500, arising under the Constitution. The Supreme Court was given appellate jurisdiction subject to writ of error or appeal.

73. *See* F. FRANKFURTER & J. LANDIS, *supra* note 49, at 64; Surrency, *supra* note 49, at 216.

74. *See* note 72 *supra*.

pansion of national power, forever changed the scope of those courts. As Frankfurter and Landis pointed out, the new Act meant that:

[t]hese courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States. Thereafter, any suit asserting such a right could be begun in the federal courts; any such action begun in a state court could be removed to the federal courts for disposition.<sup>75</sup>

By passage of this legislation, Congress added a whole new dimension to what had already been an increasing workload.

The beginning of the 1850 Supreme Court term saw 253 cases on the Court's docket.<sup>76</sup> This increased to 310 by 1860, 636 in 1870, 1212 in 1880 and 1,816 in 1890.<sup>77</sup> These increases were only the reflection of an even larger workload in the lower federal courts, where business swelled from 29,013 cases in 1873 to 38,045 in 1880 and finally to 44,194 in 1890.<sup>78</sup> As judges at all levels struggled to keep abreast of their duties, the old circuit system fell into total disrepair. Supreme Court Justices were often unable to perform their circuit duties and, as a result, district court judges, acting alone, were forced to perform nearly 90% of all circuit court business.<sup>79</sup> Since the circuit courts possessed a limited appellate jurisdiction, these single judge courts often heard appeals from cases in which the circuit judge had originally presided as a district judge.<sup>80</sup> Not only were the overworked circuits hearing their own appeals, but they were also in many instances courts of final jurisdiction. At that time, all cases initiated in the circuit courts involving less than \$5,000 were not subject to appeal.<sup>81</sup> This put a very heavy burden on a group of courts staffed only by part-time jurists.

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75. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 65.

76. *Id.* at 60. More detailed statistics regarding caseload are available in the REP. ATTY. GEN. for any of the years in question.

77. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 60.

78. *Id.*

79. *Id.* at 87.

80. *See id.* at 87-88. In 1887, under the modified original circuit court system, permanent circuit judges were supposed to hold circuit court sessions in conjunction with a Supreme Court Justice and district court judge assigned to the court. The problem with the system was that Supreme Court Justices had such a large volume of business in Washington that they were unable to perform their circuit duties, and that the circuit judges, numbering only ten, were unable to spread themselves over the 65 circuit courts. As a result, district court judges often held circuit court sessions on their own, presenting problems when the circuit court exercised appellate jurisdiction over the district courts.

81. *See id.* at 88. The practical effect of this jurisdictional limit was that cases initiated in circuit court involving less than \$5,000 were not subject to appeal—a fact which, when combined with the problem of circuit courts often being staffed by district court judges only, did not always lead to the best results.

Congress did not ignore the need for reform, but major policy disagreements existed over whether relief should be accomplished by increasing the number of courts and judges or by drastically reducing federal court jurisdiction.<sup>82</sup> These debates began in 1875, and although a new tier of federal courts in the form of separate and independent circuit courts was proposed as early as 1848,<sup>83</sup> no changes were made until 1891. By that time every level of the system was operating at such an inefficient pace that the years from 1870 to 1890 have been generally regarded as the judiciary's worst period.

The Circuit Courts of Appeals Act, also known as the Evarts Act, was signed into law on March 3, 1891.<sup>84</sup> It structurally modified the system for the first time since 1789. The Act established nine Circuit Courts of Appeals,<sup>85</sup> eliminated all Supreme Court circuit riding responsibilities,<sup>86</sup> and created new judgeships to fill the new circuit judge positions.<sup>87</sup> Most importantly, the Act provided immediate relief to the Supreme Court docket by eliminating appeal by right in nearly all cases.<sup>88</sup> This was accomplished by preserving a direct line of appeal in cases deemed more intrinsically important and making all other decisions appealable from the district courts to the new circuit courts for final disposition. The Evarts Act also greatly broadened the Supreme Court scope of review in criminal cases;<sup>89</sup> this was an especially novel element since for well over one hundred years no criminal appeals were heard in the Supreme Court.<sup>90</sup>

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82. The situation was exacerbated by a deep split between the House and Senate regarding litigation involving corporations outside of their state of incorporation. The ability of these corporations to remove to federal court was clogging circuit court dockets. Three times the House voted to restrict that source of access and three times the Senate voted it down. *Id.* at 89-91.

83. *Id.* at 70. Senator Douglas also proposed such a court in 1854 as a part of a plan of judicial reorganization. *Id.*

84. Act of March 3, 1891, ch. 517, 26 Stat. 826.

85. *Id.* §§ 1, 3, 26 Stat. 826, 827.

86. *Id.* § 2, 3.

87. *Id.* § 1, 26 Stat. 826.

88. *Id.* § 6, 26 Stat. 826, 828.

89. *Id.* § 5, 26 Stat. 826, 827-28.

90. The only avenue of federal criminal appeal available before the Evarts Act was a 1889 provision allowing writs of error in capital cases, *see* note 55 *supra*. The aforementioned problems regarding understaffed circuit courts also made their presence felt in the criminal area, especially with the unwelcome prospect of a single judge rendering life and death decisions without opportunity for review. Despite the fact that Congress had granted some appellate jurisdiction in criminal cases, feeling against the old system ran high in Congress during the enactment of the Evarts Act, and the legislation eventually provided that the Supreme Court have power of review over all appeals from "infamous" crimes. Apparently, however, none of the drafters had been aware of the Supreme Court's broad construction of what constituted an "infamous" crime. *See, e.g.,* *Parkinson v. United States*, 121 U.S. 281 (1887); *Mackin v. United States*, 117 U.S. 348 (1886); *United States v. Petit*, 114 U.S. 429 (1885); *Ex parte Wilson*, 114 U.S. 417 (1885). The subsequent codifi-



Apart from the creation of three independent tiers of federal courts, the most important contribution of the Circuit Act was its provision for discretionary review.<sup>91</sup> Although appeals from the district courts were intended to be taken to the circuit courts for final decision, Congress did allow for some further review of the circuit courts by either certification or certiorari to the Supreme Court. Certification was a discretionary process by which a circuit court could refer a difficult or important case to the Supreme Court for review; essentially the lower courts sought clarification of the law or wished to speed the appellate process.<sup>92</sup> The certiorari mechanism was unique in that it allowed litigants who had lost at a lower level to petition the Supreme Court to review their case.<sup>93</sup> Since the cases from which certiorari was to be available were considered comparatively less important than those from which direct appeal could be taken,<sup>94</sup> the device more likely was meant to be a way of correcting erroneous circuit court decisions, not a method for controlling the docket or a tool by which the Court would selectively pick cases to form the national law. However, the rationale for the creation of the writ of certiorari was never developed in the congressional debates.<sup>95</sup>

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cation of the phrase opened the gates of appeal in criminal cases far wider than had been intended. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 109-113; see also HART & WECHSLER, *supra* note 18, at 34; Warren *supra* note 37, at 51, 73.

91. Act of March 3, 1891, ch. 517, § 6, 26 Stat. 826. See HART & WECHSLER, *supra* note 18, at 40-41.

92. HART & WECHSLER, *supra* note 18, at 41.

93. See *id.* Whereas the Supreme Court previously reviewed cases which either came before it on direct appeal or were certified by the lower federal courts, litigants could now, utilizing the writ of certiorari, initiate their own petition for review of cases that otherwise would be final in the circuit courts of appeals.

94. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 99. This provision for sending the more important cases to the Supreme Court and the less difficult to the circuit courts originated in an American Bar Association Committee which had been working in conjunction with Congress on the legislation. See *Report of the Committee on Judicial Administration and Remedial Procedure*, 17 A.B.A. REP. 336, 337 (1891). This purpose is also reflected in the statute that provided that all constitutional questions, decisions of state supreme courts presenting a federal question, and capital and infamous crimes be preserved for direct Supreme Court review. Act of March 3, 1891, ch. 517, §§ 5, 26 Stat. 826, 827.

95. See 21 CONG. REC. 10286 (1890). The writ was simply intended to be a procedural mechanism by which the Supreme Court selected cases for review from the final decisions of the circuit courts of appeals. Since 1891, of course, the writ has taken on much greater importance, since the Supreme Court Justices now use it to shape the majority of their docket. The category of cases available for review under the writ has been greatly expanded, and the members of the High Court can use it to review selected cases of national importance and deny review in instances where circumstances are not appropriate for final decision or where a case is insufficient on the merits. See Blumstein, *supra* note 12, at 905-07; Brennan I, *supra* note 7, at 476-79; Goldberg, *supra* note 7, at 14-15; Warren I, *supra* note 7, at 677-78.

The Circuit Act provided immediate relief to the Supreme Court, with new filings going from 623 in 1890 to 379 in 1891, when the Act was only in operation for a few months, to 275 in 1892.<sup>96</sup> The troubles of the 1870's-1890's had been dispelled by a system that was able to efficiently keep abreast of its business in a fashion not evident since the very early days of the century. As welcome and necessary as these reforms were, though, the passage of time, along with the continued growth of national legislation, regulation and population combined to eventually erode the relief afforded by the Circuit Act. Some classes of cases remained on the obligatory docket, and it was an increase in their number that again caused the docket to grow past manageable limits. This trend is illustrated by the growth of both bankruptcy litigation and cases arising under the Federal Employers Liability Act. Prior to World War I, both types of cases were reserved to the obligatory portion of the docket; the first by express proviso in later legislation<sup>97</sup> and the second implicitly by the provision requiring review of "federal questions."<sup>98</sup> At the time of the Circuit Act, neither area was particularly important since the FELA had yet to be enacted and the bankruptcy laws had not been deemed to need direct Supreme Court review. The main problem with the bankruptcy cases involved the role of the Supreme Court in developing the law. The subject had been so thoroughly litigated and articulated that the Court was put in the position of making little more than factual review,<sup>99</sup> a function capable of being carried out by the circuit courts but that the Supreme Court retained due to the obligatory review provisions of various legislative acts. Congress remedied the situation by passing legislation in 1915 which cut off Supreme Court review as of right in all bankruptcy cases.<sup>100</sup> Congress also used the occasion to withdraw from direct review all cases arising under the trademark laws and cases coming from the district court of Puerto Rico.<sup>101</sup>

The problem with the Federal Employers Liability Act<sup>102</sup> was the theory propounded very early by the Supreme Court in the *The Employers' Liability Cases*<sup>103</sup> that compensation be allowed only for those

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96. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 102.

97. Act of March 3, 1911, ch. 231, § 252, 36 Stat. 1159.

98. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826.

99. See H.R. REP. NO. 1182, 63rd Cong., 2d Sess. (1914), reprinted in 52 CONG. REC. 435 (1914). See also F. FRANKFURTER & J. LANDIS, *supra* note 49, at 203-04.

100. Act of Jan. 28, 1915, ch. 22, § 4, 38 Stat. 803.

101. *Id.* at § 2.

102. Act of April 22, 1908, ch. 149, 35 Stat. 65.

103. 207 U.S. 463 (1908).

injuries suffered while employees were working in interstate commerce.<sup>104</sup> The complex factual situations of many different cases arising under the FELA produced a surfeit of contradictory opinions that only spawned more appeals and more litigation.<sup>105</sup> As Frankfurter and Landis pointed out: "[A] reading of the opinions constrains one to believe that these . . . cases constitute the most copious and futile waste of the Supreme Court's efforts."<sup>106</sup> Yet, under obligatory federal question review, the Court continued to review the cases and render decisions. Congress remedied the situation in 1916 by relegating the litigation to the circuit courts for final decision,<sup>107</sup> but only after the Supreme Court had struggled with the problem for more than two years. Thus, by removing bankruptcy and FELA cases from the obligatory Supreme Court docket, the caseload of the Court was at least temporarily relieved.

While Congress was able to remedy these two specific difficulties, neither piece of ameliorative legislation provided a great deal of long lasting relief.<sup>108</sup> World War I and the years following brought an expansion of regulatory activities, a wider range of trade and disputes over war contracts which all combined to once again clog the route of direct appeals.<sup>109</sup> On this occasion, reform was faster in coming because of the leadership of Chief Justice William Howard Taft, who, along with several of his colleagues on the Court, specified the most appropriate and desired form of relief.<sup>110</sup> The result of their efforts was the Judges' Bill of 1925,<sup>111</sup> which also became known as the Cert Act because of its broadening of the use of the writ of certiorari. The purpose of the Act was to relieve the burden stemming from the obligatory

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104. *Id.* at 497-99.

105. *See, e.g.,* *Norfolk So. R.R. v. Ferebee*, 238 U.S. 269 (1915); *Seaboard Air Line Ry. v. Padgett*, 236 U.S. 668 (1915); *Wabash R.R. v. Hayes*, 234 U.S. 86 (1914); *Ex parte Roe*, 234 U.S. 70 (1914); *North Carolina R.R. v. Zachary*, 232 U.S. 248 (1914); *Seaboard Air Line Ry. v. Moore*, 228 U.S. 433 (1913); *Second Employers' Liability Cases*, 223 U.S. 1 (1912). For a more comprehensive list of these cases see F. FRANKFURTER & J. LANDIS, *supra* note 49, at 207-09, n.101.

106. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 207-08.

107. Act of Sept. 6, 1916, ch. 448, § 4, 39 Stat. 726.

108. *See* F. FRANKFURTER & J. LANDIS, *supra* note 49, at 205, 216.

109. *See id.* at 105-08, 230. Much pre-war legislation, such as the Food and Drug Act (Act of June 30, 1906, ch. 3915, 34 Stat. 768), the Federal Employers Liability Act (Act of April 22, 1908, ch. 149, 35 Stat. 65) and the Anti-Narcotic Act (Act of Feb. 9, 1909, ch. 100, 35 Stat. 614, *as amended by* Act of Jan. 17, 1914, ch. 9, 38 Stat. 275) combined with active agencies such as the Interstate Commerce Commission and the Federal Reserve Board to increase judicial business. After the war, the cancellation of contracts and criminal offenses under the prohibition laws also flooded the courts. *See* 62 CONG. REC. 2584-86 (1921).

110. *See generally* P. FISH, *supra* note 58, at 79-90; F. FRANKFURTER & J. LANDIS, *supra* note 49, at 59-60.

111. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936.

docket by relegating nearly all classes of cases to the circuit courts of appeals.<sup>112</sup> The Supreme Court would then exercise its discretionary review by screening any resultant writs of certiorari.<sup>113</sup> This legislation relieved the Supreme Court workload by allowing the Justices to control the size of the docket. The Cert Act also greatly increased the number of decisions to be made in the circuit courts of appeals.<sup>114</sup> From this point on, the writ of certiorari became an important facet of Supreme Court business and procedure.

Today, the federal judicial system exists in the form established by the Judiciary Act of 1789 and modified by the Circuit Act and the Judges' Bill. The number of Supreme Court justices was eventually fixed at nine.<sup>115</sup> The number of circuits has been increased to eleven,<sup>116</sup> and many more circuit and district judgeships have been added.<sup>117</sup> The only major structural deviation from the 1789 system was the Circuit Act's formation of new circuit courts.

Reform of the federal courts has thus assumed a constant pattern in which new provisions are outstripped by the needs and demands of a changing society. The advent of reform is often a long process that requires outdated judicial structures and procedures to function in the face of an ever-accumulating workload. As demonstrated by the attempts to abolish circuit riding and to create the modern circuit court system, Congress has been slow in enacting judicial reform. Judicial problems often reach their worst possible stage before meriting any congressional attention.

Two important points stand out when reviewing this period of growth and expansion of the federal courts. First, many jurisdictional concepts are merely aspects of judicial procedure which were not, as is often assumed, part and parcel of the original statutory or even constitutional organization. The writ of certiorari, for example, appeared in

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112. *Id.*, which amended the Act of March 3, 1911, ch. 231, §§ 128-29, 237-40, 36 Stat. 1087-89, to make most categories of decisions final in the circuit courts of appeals. The class of cases preserved for direct Supreme Court review included suits under the antitrust and interstate commerce law, suits to enjoin orders of the Interstate Commerce Commission, suits to enjoin enforcement of state statutes or action by state administrative officers, and writs of error by the United States in criminal cases. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936, *amending* Act of March 3, 1911, ch. 231, § 238, 36 Stat. 1087, 1089. Older provisions, such as those giving the Supreme Court direct review of state supreme court decisions involving a federal question, were not affected.

113. Act of Feb. 13, 1925, ch. 231, § 1, 43 Stat. 936, *amending* Act of March 3, 1911, Pub. L. No. 475, §§ 237-38, 36 Stat. 1087, 1089.

114. See F. FRANKFURTER & J. LANDIS, *supra* note 49, at 262-63.

115. Act of April 10, 1869, ch. 22, § 1, 16 Stat. 44.

116. Act of June 25, 1948, ch. 645, § 41, 62 Stat. 870.

117. See, e.g., Act of March 18, 1966, Pub. L. No. 89-372, § 1, 2, 80 Stat. 75.

1891 and only acquired its present status as a central tool of discretionary review in the last fifty years. In addition, broad subject matter jurisdiction was not always a characteristic of the federal courts. Full federal question jurisdiction was not conferred until 1875, and no federal criminal cases were heard by the Supreme Court before 1891.<sup>118</sup> It should be remembered that the federal courts were designed as courts of very limited jurisdiction, and that many questions of law were to be decided by state tribunals. Even when a case reached the old circuit courts, a decision was often final because of the jurisdictional \$5000 limit. At one time it was even possible for single federal district judges to nullify an act of Congress.<sup>119</sup> The broad, all encompassing federal judiciary of the 1960's and 1970's is therefore a creature of rather recent birth whose character was never fully anticipated by the designers of the original plans.

The second and more important aspect of the historical analysis is the broad architectural role played by Congress in implementing the various reforms. Without questioning the scope of its own powers or being questioned by the courts, Congress has created and eliminated judges and courts, curtailed and expanded the limits of federal jurisdiction, and essentially assumed full and total control over the whole federal court system. Apart from any abstract discussion of constitutional limitations, there is no evidence that Congress ever felt constrained by the Constitution to adhere to any specific standards, and there is little evidence suggesting that observers or critics ever tried to hold it to such. While the exact boundaries of congressional power in this area are discussed in a later section, Congress seems to have continually regarded its powers in this area as plenary.

These considerations should be kept in mind when viewing the current status of the judiciary. Recent caseload controversies may well be the beginning of another chapter in the saga of appellate court reform, and the creation of new mechanisms, an abandonment of seemingly well-entrenched principles and what might appear to be a

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118. See note 97 *supra*.

119. In *United States v. Armour & Co.*, 142 F. 808 (N.D. Ill. 1906) a federal district judge blocked an important antitrust prosecution by quashing the indictment. Under the current statutory scheme, the government had no right of appeal, and the case against Armour was dismissed. The uproar over this result eventually led to statutory reform. Yet, as Frankfurter and Landis point out, the reform was implemented only because of the notoriety of that particular case. The scheme of review had long been a part of the judicial system and "had been urged [for repeal] by Attorneys General for fifteen years without evoking a ripple in Congress. . . ." F. FRANKFURTER & J. LANDIS, *supra* note 49, at 114-18.

startling congressional exercise of power must be recognized as time-tried elements of a well-traveled road to institutional change.

#### D. The Appellate Explosion

The growth of industrial America combined with the expansion of federal regulation and national commerce have worked throughout history to overload the federal courts. Congress debates changes and eventually remedies the situation, and then awaits the inevitable reoccurrence of the problems. The last two instances of this phenomenon, before the Circuit Act of 1891 and the Cert Act of 1925, were both in the form of an overload of the Supreme Court obligatory docket, but the most recent problem is simply a sheer avalanche of petitions for discretionary review and a troublesome increase in the number of cases arising on direct appeal.<sup>120</sup> From 1952 to 1971, the number of cases on the Supreme Court docket increased from 1,429 to 4,515. In 1952, the newly filed cases numbered 1,283; by 1971 they had increased to 3,643. The total number of cases peaked at over 5,000 and has hovered around that number ever since.<sup>121</sup>

The lower federal courts have experienced an equal, if not greater, upswing. From 1968 to 1975, filings in the federal district courts increased from 102,163 to 148,298. Filings in the federal courts of appeals, which had more than doubled from 1961 to 1968, increased from 9,116 to 16,658 during the period from 1968 to 1975.<sup>122</sup> In terms of percentages, the district court filings have increased 26% since 1970, with courts of appeals filings up 43% for the same period. The exact character of these increases is a matter of great dispute.<sup>123</sup> Some commentators have claimed that while the actual number of cases on the Supreme Court docket has increased, the substantive workload of the Court remains the same, the increase being due largely to frivolous appeals.<sup>124</sup> Other commentators see the problem as one which only afflicts the lower federal courts.<sup>125</sup> Two groups deem the problem serious enough to merit abolition of all routes of direct appeal to the Supreme

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120. FREUND REPORT, *supra* note 1, at 2-9.

121. *Id.* at A-2. See also *The Supreme Court—1975 Term*, 90 HARV. L. REV. 1, 278-79 (1976); *The Supreme Court—1976 Term*, 91 HARV. L. REV. 1, 297-98 (1977).

122. 1975 MANAGEMENT STATISTICS FOR UNITED STATES COURTS 126 (1976).

123. See *Brennan I*, *supra* note 7, at 473-78; *Gressman I*, *supra* note 7, at 952-54; *Warren & Burger*, *supra* note 7, at 722. But see A. BICKEL, *supra* note 7, at 4-6; *Freund I*, *supra* note 7, at 139-141.

124. "Contrary to the Study Group's assumption, the Supreme Court is not overworked." *Brennan I*, *supra* note 7, at 475-76.

125. See, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151, 175-76 (1972) (Douglas, J., dissenting).

Court, the division of existing circuit courts of appeals into smaller entities or the creation of new circuits, vast curtailment of federal jurisdiction, or even the creation of a National Court of Appeals.<sup>126</sup>

Concern about the effects of Supreme Court overwork commonly follow two general lines. First the Supreme Court is seen to be so overtaxed by the mere volume of petitions for review that the screening process occupies too much of the Justices' time, leaving them little opportunity to properly perform their other functions.<sup>127</sup> Second, there is a related concern regarding appellate capacity, referring to the ability of the Supreme Court to make sufficient decisions to maintain stability and coherency in the national law.<sup>128</sup> It has been argued that while much of the Court's increased workload is non-substantive, a certain constant percentage of filings should be reviewed, especially those representing conflicts among the lower courts. While that percentage rises along with the total number of cases, the Supreme Court continues to review only a relatively fixed number of cases and write a relatively fixed number of opinions.<sup>129</sup> The effect of this is said to be a general increase in the number of important decisions that are not made, adding an ever increasing amount of uncertainty to the national law.<sup>130</sup>

Controversy is nothing new to the federal judicial system. Societal trends directly affect the courts, and are accompanied by heated debates over what, if anything, to do about the current problems. The actual substance of the supposed "caseload crisis" is a subject best left to other forums, but it is obviously a matter causing great concern. The creation of both the Freund Study Group and the Hruska Commission are outgrowths of such concern; both groups have proposed a National Court of Appeals as one solution to the problem. Lack of immediate affection for such proposals is also nothing new, but as the history of judicial reform indicates, contemporary opinions about the judicial structure and function must often be reevaluated before lasting change can be effectuated. This was true with both circuit riding and direct routes to Supreme Court review; it may well be true again.

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126. See FREUND REPORT, *supra* note 1, at 25-36; HRUSKA REPORT, *supra* note 1, at 5-10.

127. See FREUND REPORT, *supra* note 1, at 4-9.

128. See HRUSKA REPORT, *supra* note 1, at 1-3.

129. See Griswold, *supra* note 6, at 339-41. "[A]bout eighteen percent of paid cases (appeals and certiorari) were heard on the merits twenty years ago, while about six percent of paid cases were heard on the merits during the 1973 Term. What became of the other twelve percent of paid cases? . . . [T]hey were lost in the 1973 Term simply because of inadequate appellate capacity to hear cases on a national basis." *Id.* at 341 (footnote omitted).

130. *Id.*; see also HRUSKA REPORT, *supra* note 1, at 5-8, 76-90.

In viewing the current proposals for a National Court of Appeals, it is well to remember that at the outset the Constitution provided only broad contours for the federal judiciary and gave Congress the authority and discretion to design a federal court system under article III provisions. Furthermore, history shows that aside from the three-tiered hierarchy of district, circuit and Supreme courts, other judicial matters, such as jurisdiction and power of review, have been subject to considerable change and redesign, consistent with what appears to be the constitutional scope of congressional power.

## II. The National Court Of Appeals

### A. The Freund Report

Congress created the Federal Judicial Center in 1968 to "research and study . . . the operation of the courts of the United States."<sup>131</sup> Chief Justice Burger, in his capacity as chairman of the Center, established the Freund Study Group to "study the caseload of the Supreme Court and to make such recommendations as its findings warranted."<sup>132</sup> The Study Group was comprised of non-jurists who had all had extensive experience with the workings of the Supreme Court.<sup>133</sup> The Study Group filed their final report, the Freund Report, in December, 1972.

The Study Group concluded that the exponential caseload rise would continue and that "the conditions essential for the performance of the Court's mission do not exist."<sup>134</sup> After rejecting such remedies as additional law clerks,<sup>135</sup> restricting the Supreme Court to a constitu-

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131. Act of Dec. 20, 1967, Pub. L. No. 90-219, § 620, 81 Stat. 664.

132. FREUND REPORT, *supra* note 1, at ix.

133. The members of the Study Group and their affiliation at the time the Report was compiled were Paul A. Freund (Harvard Law School), Alexander M. Bickel (Yale Law School), Peter D. Ehrenhaft (a Washington, D.C. attorney), Russell D. Niles (Director of the Institute of Judicial Administration, former Dean of New York University Law School), Bernard G. Segal (former president of both the American Bar Association and American College of Trial Lawyers), Robert L. Stern (a Chicago attorney, co-author with Eugene Gressman of *SUPREME COURT PRACTICE* (3rd ed. 1962)), and Charles Alan Wright (University of Texas School of Law).

134. FREUND REPORT, *supra* note 1, at 5. But see Casper & Posner, *A Study of the Supreme Court's Caseload*, III JOURNAL OF LEGAL STUDIES 339 (1974). Those authors use several factors to show that exponential caseload rise is not a certainty, and that the number of certiorari filings depends on "(1) the number and scope of new federal rights, (2) the procedural devices that facilitate or obstruct the enforcement of federal rights, (3) the costs to litigants of asserting such rights at various stages of the litigation process, and (4) the certainty or definiteness of the rights." *Id.* at 360.

135. FREUND REPORT, *supra* note 1, at 15-16.



tional court<sup>136</sup> or dividing the Supreme Court into panels,<sup>137</sup> the Study Group made four major recommendations. The first was to eliminate three judge district courts and to make all cases now appealable as of right appealable only by writ of certiorari, thereby giving the Supreme Court total control over its docket.<sup>138</sup> The second proposal was the establishment of a non-judicial agency to process prisoner appeals,<sup>139</sup> and the third suggestion was increased staff support for the Supreme Court Clerk's office and improved secretarial and library facilities.<sup>140</sup>

The final and central proposal was the recommendation of a National Court of Appeals (NCA).<sup>141</sup> The main function of the NCA would be to screen all petitions for certiorari and appeals and certify to the Supreme Court those most appropriate for Supreme Court review. The NCA would also decide conflicts among the lower federal courts that do not merit Supreme Court review. The entire NCA screening process, including denying certiorari petitions and deciding which cases to retain for review, would be governed by Supreme Court policy guidelines set down by the Supreme Court rulemaking power or other appropriate mechanism.<sup>142</sup> All of these decisions, as well as denials of certiorari, would be final. Once a case was certified, the Supreme Court could dispose of it by decision, denial of review, or reference back to the National Court of Appeals for a final binding decision. The result of such a reform would be to relieve the Supreme Court of the task of screening certiorari petitions. While this change would effect a substantial time savings, the Supreme Court would be deprived of the ability completely to pick and choose those cases it wished to review.<sup>143</sup>

The Freund Report's call for a National Court of Appeals aroused a storm of protest, most notably from members of the Supreme Court and judges of the lower courts.<sup>144</sup> The attacks covered many areas, ranging from contentions by former Court members Warren and Goldberg that such a plan would violate the constitutional edict of "one supreme Court" because of the NCA's ability to make final deci-

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136. *Id.* at 10.

137. *Id.* at 7-8.

138. *Id.* at 26-27.

139. *Id.* at 47-48.

140. *Id.* at 43-45.

141. *Id.* at 18-24.

142. *Id.* at 22-23.

143. The Supreme Court would retain the power to grant certiorari before judgment in a court of appeals, before judgment in the National Court of Appeals, or before denial of review by the NCA. The Study Group urged that this power be used only in exceptional circumstances. *Id.* at 21.

144. See note 7 *supra*.

sions,<sup>145</sup> to claims that eliminating the Supreme Court screening function would entail a loss of control over national priorities in constitutional and legal matters.<sup>146</sup> It was argued that cases such as *Brown v. Board of Education*<sup>147</sup> and *Baker v. Carr*<sup>148</sup> would never have been certified by an NCA because they were so completely controlled by precedent.<sup>149</sup> There was also a fundamental disagreement led by former Chief Justice Warren and Justices Douglas and Brennan with the Freund Report's assessment of the Court's workload.<sup>150</sup> They argued, in Douglas' words, that "[t]he case for our 'overwork' is a myth."<sup>151</sup>

The amount and degree of opposition doomed the proposals of the Freund Study Group to getting no further than the pages of its final report. Apart from the propriety of its provisions, the Study Group's ideas do provide an interesting insight into the functions which a National Court of Appeals might perform. It also provides, along with its criticisms, a practical view of the constitutional aspects of judicial reform.

## B. The Hruska Commission

Congress created the Commission on Revision of the Federal Court Appellate System on October 13, 1972.<sup>152</sup> The Commission was composed of seventeen members; four each were appointed by the House, Senate, President and Chief Justice, with the original sixteen selecting an executive director.<sup>153</sup> Senator Roman L. Hruska was appointed chairman. The Commission's work was divided into two phases; the first dealt with geographical boundaries of the federal judi-

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145. Black, *supra* note 7, at 885; Goldberg, *supra* note 7, at 14; *Warren I*, *supra* note 7, at 677-78.

146. *Brennan I*, *supra* note 7, at 480-84.

147. 347 U.S. 483 (1954).

148. 369 U.S. 186 (1962).

149. Black, *supra* note 7, at 888-90; Goldberg, *supra* note 7, at 14-15; *see also Warren & Burger*, *supra* note 7, at 729.

150. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174-75 (1972) (Douglas, J., dissenting); *Brennan I*, *supra* note 7, at 475-76; *Warren & Burger*, *supra* note 7, at 722.

151. 409 U.S. at 174 (Douglas, J., dissenting).

152. Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1, 86 Stat. 807.

153. Commission members at the time of the filing of the Final Report were: Senators Quentin N. Burdick, Hiram L. Fong, Roman L. Hruska and John L. McClellan; Congressmen Jack Brooks, Walter Flowers, Edward Hutchinson and Charles E. Wiggins; Emanuel Celler, Roger C. Cramton, Francis R. Kirkham and Judge Alfred T. Sulmonetti (appointed by President Ford); and Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal and Herbert Wechsler (all appointed by the Chief Justice). These members selected A. Leo Levin (the present director of the Federal Judicial Center) as their executive director.

cial circuits, the second with structure and procedures of the federal courts. Congress did limit the scope of the Commission's work by specifically excluding any considerations of federal court jurisdiction.<sup>154</sup> The Commission's final report (Hruska Report) on the second phase of their work was issued in June, 1975, and called for a new version of a National Court of Appeals.<sup>155</sup>

The Commission's primary concern was the lack of an adequate national appellate capacity.<sup>156</sup> An examination of the Supreme Court caseload showed that while the district courts and the circuit courts of appeals annually issue an ever increasing number of decisions, the Supreme Court, despite an explosion in the number of petitions for certiorari, continues to make the same number of decisions on the merits each year.<sup>157</sup> As a result, where the Supreme Court once reviewed 20% of all courts of appeals decisions, it now reviews only 1%.<sup>158</sup> The Commission concluded that many cases that were proper for review and that would have been reviewed in past years were now being denied certiorari because of a lack of Supreme Court capacity. The outgrowth of this lessened supervision was said to be an erosion of the consistency of national law, with circuits continually more likely to be in opposition with each other and less likely to have their decisions reviewed. This situation was viewed as promoting both uncertainty and forum shopping by litigants in search of a favorable decision.<sup>159</sup>

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154. HRUSKA REPORT, *supra* note 1, at 2.

155. *Id.* at 5-10.

156. *Id.* at 1-4, 5-10, 13-16, 76-90.

157. See Griswold, *supra* note 6, at 339-41. See also note 141 *supra*.

158. HRUSKA REPORT, *supra* note 1, at 12.

159. The Commission cited studies on unresolved conflicts among the lower federal courts and on the increase in the number of dissents from the denial of certiorari. In "Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court" (reprinted in HRUSKA REPORT, *supra* note 1, at 93-111), Floyd Feeney studied the denied petitions for certiorari for the 1971 and 1972 terms of the Supreme Court (without considering any in forma pauperis motions). Feeney concluded that the existence of conflicts among the circuits not reviewed by the Supreme Court was greatly increasing, with a projected average of approximately sixty-five per year. *Id.* at 108-09. The Commission selected six cases from the study as primary examples of the inadequate appellate capacity: *Cirillo v. United States*, 410 U.S. 989 (1973) (admissibility of hearsay evidence in a criminal conspiracy trial); *Kocher v. United States*, 411 U.S. 931 (1973) (tax); *American Airlines v. Locaynia*, 409 U.S. 982 (1972) (vacation pay as a veteran's property right under the Universal Training and Service Act); *Castell v. United States*, 406 U.S. 918 (1972) (required provisions in a federal indictment for possession of stolen goods in interstate commerce); *Fields v. Schuyler*, 411 U.S. 987 (1972) (patents); *Milstein v. GAF Corp.*, 496 U.S. 910 (1972) (Securities Exchange Act interpretation). *Id.* at 109-11. But see Owens, *supra* note 8, at 596. In surveying the number and quality of dissents from the denial of certiorari by the Supreme Court, the Commission perceived a general inference that the Court was unable to decide every case worthy of review. *Id.* at 116. But see Owens, *supra* note 8, at 597-98. The Commission made a detailed statistical study of the number of these dissents and also relied on the various reasons given in the

The Commission's major remedy was the creation of a National Court of Appeals, a tribunal aimed more at increasing the number of nationally binding decisions than relieving the burden on any particular court. The NCA would receive cases by two methods, transfer jurisdiction<sup>160</sup> and reference jurisdiction.<sup>161</sup>

Under transfer jurisdiction, pending cases would be sent up from the circuit courts of appeals, the Court of Claims or the Court of Customs and Patent Appeals. Cases would be transferred if an immediate decision by the NCA would be in the public interest or if a case fell within one of the three following categories: 1) if the case turns on a rule of federal law and federal courts have reached inconsistent conclusions with respect to it; 2) the case turns on a rule of federal law "applicable to a recurring factual situation," and it is determined that a prompt NCA decision would outweigh any disadvantages of a transfer; or 3) the case turns on a rule of federal law previously announced by the NCA and substantial questions regarding the interpretation or application of that rule are present in the case.<sup>162</sup> Transfer motions would not be motions of appeal, and could be initiated by either a party to a case or the lower court itself.<sup>163</sup> The NCA would also be empowered to decline to accept the transfer of any case,<sup>164</sup> and any transfer decision on the merits would be subject to Supreme Court review by certiorari.<sup>165</sup>

The National Court of Appeals reference jurisdiction would be comprised of cases sent down to it by the Supreme Court from the regular petitions for certiorari.<sup>166</sup> This category would contain those cases which the Supreme Court is supposedly not deciding due to lack of time. The Supreme Court would be authorized, in regard to any certiorari petition, to 1) retain the case for decision on the merits; 2) deny certiorari and terminate the case; 3) deny certiorari and refer the case to

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denials. *See, e.g.,* Bailey v. Weinberger, 419 U.S. 953 (1974), where Justice White, joined by Justices Douglas and Stewart, stated: "It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented. . . . Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals, or between federal and state courts, and perhaps we must tolerate the fact that in some instances enforcement of federal law in one area of the country differs from its enforcement in another. These situations, it is hoped, will be few and far between." *Id.* at 953-54.

160. HRUSKA REPORT, *supra* note 1, at 34-38.

161. *Id.* at 32-34.

162. *Id.* at 34-35.

163. *Id.* at 37.

164. *Id.* at 35.

165. *Id.* at 38-39.

166. *Id.* at 32.

the NCA for a decision on the merits; or 4) deny certiorari and refer the case to the NCA, giving that court discretion to terminate the litigation or make a decision on the merits.<sup>167</sup> The Supreme Court would also be authorized to refer cases within its obligatory jurisdiction, except those which the Constitution requires it to accept, for decisions on the merits.<sup>168</sup> Two important aspects of reference jurisdiction are; (1) that all certiorari petitions would still be filed with the Supreme Court and, (2) that all cases referred to the NCA for decision would again be subject to Supreme Court review by certiorari.<sup>169</sup>

The system proposed by the Hruska Report would be substantially similar to current court procedures. Petitions for certiorari would still be filed with the Supreme Court, and appeals from the federal district courts would continue to be taken to the circuit courts of appeals. The difference to litigants would be the possibility of seeking a transfer or being transferred from a circuit court or having a petition for certiorari referred to the NCA. The reference provision would significantly enhance prospects for review since the Supreme Court would presumably be referring to the NCA those petitions which it is presently denying.<sup>170</sup> The NCA could also curtail forum shopping, since consistency in the law would ostensibly be improved.

The Hruska Commission proposals were less controversial than those of the Freund Study Group, and in general provoked a much less passionate response.<sup>171</sup> Criticism of the Hruska Court followed three general lines. First, it was argued that this type of NCA would treat only the symptoms of the problem, ignoring the actual caseload volume, and that symptomatic relief does not justify the creation of a new court.<sup>172</sup> Secondly, many contend that cases transferred from the lower courts to the National Court of Appeals that the NCA chose to hear would often be cases which are not yet ripe for national decision.<sup>173</sup> In other words, a case concerning a very important, very sensitive issue

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167. *Id.* at 32-33.

168. *Id.*

169. *Id.* at 38.

170. *Id.* at 33-34.

171. *See* note 8 *supra*.

172. *See, e.g.,* Owens, *supra* note 8, at 606. *See also,* Miller, *Proposed New "National Court of Appeals,"* Washington Post, Jan. 11, 1976, § F, at 1, col. 1; *Hearings II, supra* note 8, at 1109 (remarks of Bazelon).

173. *See Hearings I, supra* note 8, at 175 (remarks of Goldberg); *id.* at 211 (remarks of Friendly); *id.* at 512 (remarks of Stevens); *Hearings II, supra* note 8, at 699 (remarks of Aldisert); *id.* at 793 (remarks of Field); *id.* at 907 (remarks of Lay). With the exception of Field, a Law Professor at the University of Pennsylvania, and former Justice Goldberg, all of the above are federal judges.

could arise in a circuit court and be transferred to the NCA. That court would act in lieu of the circuit court but, while a circuit decision would only bind one geographic area, the NCA decision would bind the whole country. The Supreme Court would thus be left in the unenviable position of having to either affirm, reverse or deny review in a case which, if it had simply denied certiorari, would never have gone beyond circuit consideration. These specific criticisms may have had an effect on the supporters of this form of NCA, since one of the two bills currently before Congress does not contain a transfer jurisdiction provision.<sup>174</sup>

The third major criticism involves a basic value judgment, with those against a new court arguing that the problem of inter-circuit conflicts is overrated and that the appellate capacity is adequate for contemporary needs.<sup>175</sup> Proponents of this view urge that consistency in the national law is at best an illusory concept, and that the NCA would add little in the way of concrete guidelines.

In terms of constitutional considerations, a thorough reading of the Hruska Commission's Final Report shows that the Commission scrupulously avoided the constitutional controversies touched off by the Freund Study Group. The Hruska Court would not infringe upon the sensitive issue of Supreme Court docket control, since the Supreme Court would still review every petition for certiorari. Every effort was made to preserve all of the current Supreme Court functions and duties. However, such provisions have not stifled all of the constitutional criticism; Eugene Gressman feels that a National Court of Appeals, since it would be another court making nationally binding decisions, would violate the proviso for one Supreme Court.<sup>176</sup> He also suggests that this sort of broad restructuring of the courts is not within the congressional ambit of power.<sup>177</sup> Despite the fact that the constitutional criticisms are not as much in the forefront as they were with the Freund Report, the issue still remains. Apart from the various policy debates, it must be determined whether this proposed National Court of Appeals

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174. S. 3423, 94th Cong., 2d Sess. (1976).

175. See *Hearings I*, *supra* note 8, at 211 (remarks of Friendly); *id* at 512 (remarks of Stevens); *Hearings II*, *supra* note 8 at 699 (remarks of Aldisert); *id.* at 753 (remarks of Leventhal); *id.* at 808 (remarks of Coffin).

176. *Hearings II*, *supra* note 8, at 1319-24 (statement of Gressman). In his statement, Gressman reiterated his views expressed in *Gressman I*, *supra* note 7, at 951. Gressman, co-author with Robert Stern (a member of the Freund Study Group) of *SUPREME COURT PRACTICE* (3rd ed. 1962), has been one of the foremost critics of both the Freund and Hruska proposals for an NCA.

177. *Hearings II*, *supra* note 8, at 1319-21 (remarks of Gressman).

would comply with the terms of the Constitution and whether Congress possesses the power to make such a structural adjustment.

### III. The Constitutional Issues

#### A. "One supreme Court"

"*Section 1.* The judicial Power of the United States shall be invested in one supreme Court. . ."<sup>178</sup> The first sentence of article III, section 1 captures the essence of the primary constitutional objection to a National Court of Appeals, namely, that the NCA would assimilate many Supreme Court functions and characteristics and thus create two Supreme Courts in everything but name. In this view "one supreme Court" is seen as meaning just that: no other court may share its essential functions without assuming its own "supreme" character.<sup>179</sup> This constitutionally commanded singularity is thus seen as demanding that only one voice set down the "supreme law of the land," and that that one voice have but one jurisdiction and share its duties with no other tribunal. Under this view, both the Freund and Hruska plans would appear to be constitutionally invalid. The Freund plan would fail because of its provisions allowing the NCA to make final decisions, thus becoming a second supreme authority, and giving the NCA the ability to screen petitions for certiorari, thus controlling the Supreme Court's single jurisdiction. The Hruska plan would be invalid because reference jurisdiction operates to share or delegate Supreme Court duties to another court for nationally binding decisions, thus also sharing the single jurisdiction.

As previously discussed, the early history of the Constitution provides little guidance in a search for original intentions. It is clear that there were not to be two Supreme Courts, but that conclusion is justified only by the explicit language of the Constitution. Neither article III itself nor the various original materials say anything regarding special characteristics of the High Court that would make it and no other supreme. The Judiciary Act of 1789, as the first embodiment of the constitutional language, provides more guidance in the search for original intent in regard to this precise term.

The "one supreme Court" of 1789 bears little resemblance to the 1978 version. The jurisdiction of the whole federal court system was much narrower then than it is now, since all cases arose on direct ap-

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178. U.S. CONST. art. III, § 1.

179. See generally Black, *supra* note 7, at 885-87; Gressman I, *supra* note 7, 960-64; Poe, Schmidt & Whalen, *supra* note 7, at 855; Warren & Burger, *supra* note 7, at 729-30.

peal and many were not even appealable to the Supreme Court.<sup>180</sup> It was not until 1875 that Congress invested broad federal jurisdiction in the national judiciary<sup>181</sup> and not until 1891 that the Circuit Act introduced certiorari as a mechanism for discretionary Supreme Court review.<sup>182</sup> It was true for many years that certain circuit court decisions were not reviewable by the Supreme Court.<sup>183</sup> Thus the original "one supreme Court" functioned without provisions for discretionary review, was unable to consider every case in the federal system, and did not even have broad subject matter jurisdiction, due to the limited capacities of the lower federal courts. Therefore, it seems unlikely that any one of these powers was perceived as being constitutionally mandated without having been a part of the framers' original Supreme Court structure.

Objections to proposals for a National Court of Appeals may be based more on policy considerations than on actual constitutional theory. The concepts of discretionary review, broad federal jurisdiction and the ability of the Supreme Court to hear all federal cases, all currently accepted as fundamental elements of judicial power, have their origins in legislative efforts to improve judicial administration, not in any deeply ingrained constitutional principles. While each addition to Supreme Court practice has had its own effect, all of them taken together have broadened the scope of judicial authority and ensconced the Supreme Court in its contemporary role. Viewing developments in this area in their proper historical perspective is important because of the ease with which a constitutional glaze can be affixed to well-accepted judicial methods and structures, a glaze which impairs a true constitutional analysis of the issues raised by a National Court of Appeals.

The Freund Report's National Court of Appeals, as envisioned by its creators, would not create a second Supreme Court. The objections raised against the court fall because of their overreliance on policy considerations or because of misconceptions as to the NCA's perceived role. There are two major, related criticisms which run through the majority of the anti-Freund commentary. The first refers to the NCA's ability to screen all petitions for certiorari and forward to the Supreme Court only those that it deems important enough for the Court's consideration. It is claimed that the current ability of the Supreme Court to

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180. See notes 49-50 and accompanying text *supra*.

181. See note 72 and accompanying text *supra*.

182. See notes 91-93 and accompanying text *supra*.

183. See notes 49-50 and accompanying text *supra*.



review all petitions for certiorari is a crucial aspect of the decision-making process and that to strip the screening function away and invest it in another court would involve a disturbance of the Supreme Court's constitutional decision-making power.<sup>184</sup> Related to this is the contention that the NCA mandate requiring dismissal of petitions that are obviously controlled by precedent would preclude any Supreme Court reconsideration of "settled areas," foreclosing the High Court's ability to make decisions such as *Baker v. Carr*.<sup>185</sup> The second common criticism focuses on the potential for a shared jurisdiction between the Supreme Court and the National Court of Appeals which would theoretically create more than one Supreme Court.<sup>186</sup> This objection goes to that aspect of the proposal which would allow the National Court to make some decisions on the merits without the possibility of any subsequent Supreme Court review. It is claimed that such a proviso could eventually lead to two supreme courts in areas in which the NCA decided to retain cases for its own decision. For example, were the National Court to receive three labor law cases, pass one up and retain the other two, there would be two courts of essentially concurrent jurisdiction making nationally binding labor law decisions—and the Supreme Court would be powerless to correct what it might think was an obviously miscreant NCA decision. The crux of this second criticism is that the implementation of the Freund NCA would result in two courts sharing what the one Supreme Court presently does, resulting in two supreme courts.

As for the contention that screening certiorari petitions is a fundamental part of the constitutional decision-making process, it seems clear that this issue involves an allocation of judicial power well within the purview of congressional authority. The entire process of discretionary review was not conferred upon the Supreme Court until 1891 and was expanded to its present form only in 1925.<sup>187</sup> The argument that the Constitution requires a screening ability on the part of the Supreme Court is somewhat strained when it is shown that the federal court system operated without it for over 100 years. Congress first created certiorari in 1891 to allow review of questionable circuit courts of appeals decisions.<sup>188</sup> The use of the writ was expanded in 1925 to re-

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184. See *Gressman I*, *supra* note 7, at 957-60; *Hearings II*, *supra* note 8, at 1322-24 (remarks of Gressman); Poe, Schmidt & Whalen, *supra* note 7, at 855; *Warren I*, *supra* note 7, at 677-79.

185. 369 U.S. 186 (1962). See Goldberg, *supra* note 7, at 16; Poe, Schmidt & Whalen, *supra* note 7, at 851-53.

186. See Black, *supra* note 7, at 885; Goldberg, *supra* note 7, at 14-16; *Gressman I*, *supra* note 7, at 960-64; *Warren I*, *supra* note 7, at 678.

187. See notes 84-91, 111-14 and accompanying text *supra*.

188. Act of March 3, 1891, ch. 517, § 6, 26 Stat. 826.

lieve the High Court of a tremendous burden on its appellate docket by allowing the justices to pick and choose those cases they wished to hear.<sup>189</sup> It may well be true that the use of the writ has now gone beyond these purposes to also include the timing of appeals as to when they are ripe for review or to maintain a broad contact with all areas of the federal law. Regardless of these changes, though, the entire screening process is one that was created for the courts by Congress, and it would seem that if Congress so desired it could eliminate the writ altogether without offending the Constitution.<sup>190</sup> Of course the Freund proposal makes no such drastic recommendation since it entrusts to another court the power to decide which cases are most appropriate for Supreme Court disposition. The appellate jurisdiction of the Supreme Court would hardly be decimated since the National Court would be expected to forward a great many more petitions for review than the Supreme Court would formally decide. The High Court would still decide which cases it wished to hear, but the pool of supplicants would be much smaller.<sup>191</sup>

The contentions that the Freund NCA would frustrate the Supreme Court's ability to change important precedents and that a shared or concurrent jurisdiction would violate the concept of "one supreme Court" both share a basic misconception of the roles to be played by both the Supreme Court and the NCA within the appellate system. As was previously mentioned, the NCA would be expected to pass up many more petitions than the Supreme Court would ever finally decide; for example, 400 petitions would lead to 150 decisions.<sup>192</sup> The Freund Study Group did not intend that this forwarding process would occur without strictures; they specifically mentioned in their report that the whole process would be governed by guidelines set down

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189. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936.

190. A more serious question might arise if Congress were to eliminate all appellate jurisdiction by abolishing the writ of certiorari. This could be done by transferring all obligatory appeals to the discretionary docket, which would make all appellate jurisdiction subject to writ of certiorari, and then abolishing the writ. Both Ratner and Hart would likely object to that change as an impermissible interference with the Supreme Court's essential role in the governmental plan. See notes 228-29 and accompanying text *infra*. On the other hand, Owen J. Roberts, shortly after leaving the Supreme Court, argued that a constitutional amendment would be necessary to insure that Congress never take that very action. See Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1, 3-4 (1949). See also *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J. dissenting), where Justice Frankfurter claimed that "Congress need not give this Court any appellate power." In any case, neither proposal for an NCA seeks to eliminate Supreme Court appellate jurisdiction.

191. FREUND REPORT, *supra* note 1, at 18, 21.

192. *Id.* at 21.

by the Supreme Court in its rules.<sup>193</sup> These rules were to set forth criteria both for referral to the Supreme Court and for NCA final decisions. It was also expected that the Supreme Court would communicate its intention in more frequent addenda to denials of certiorari from the NCA.<sup>194</sup> The Study Group was very flexible in planning for ways in which the Supreme Court constantly could communicate criteria for the NCA reviewing process, and it was contemplated that any case involving serious doubt would be forwarded to the High Court.<sup>195</sup>

These provisions seem to defuse the main points of the two criticisms. It is true that without the opportunity for continual communication between the two courts the fears of the critics may well be realized. In fact, without substantial Supreme Court guidelines, the National Court could retain important decisions for itself and relegate others to the Supreme Court, a course that would reverse the contemplated roles of those two tribunals. Given the intended nature of the process, however, with its broad allowance of Supreme Court rulemaking, it is clear that the Supreme Court could communicate a desire to rehear long-standing precedent and could establish its intention to make all the important policy decisions in any given legal area. Any statute implementing such an NCA would almost certainly stress the nature of this relationship in its explicit terms. In addition to these guidelines, the Freund Report would retain Supreme Court power to grant certiorari before judgment in a Court of Appeals, before denial of review in the NCA or before judgment in a case heard there. All of these provisions taken together would seem to eliminate the concern over both non-review of past cases and any concurrent jurisdiction.<sup>196</sup>

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193. *Id.* at 20-23.

194. *Id.* at 23.

195. *Id.* at 21. See also A. BICKEL, *supra* note 7, at 33; Freund I, *supra* note 7, at 143, Freund II, *supra* note 7, at 1306-08. Freund, while allowing that the Supreme Court would communicate its desires through the rule-making process and through comments made with denials of certiorari, argues that the NCA would not be in a position of pure "responsibility" but would also have its own authoritative role. *Id.* at 1306. This authority would apparently be derived from the NCA's ability to select cases for its own final review, since Bickel, also a Study Group member, noted that "[T]he loss [of control] would not be critical, especially since means are provided for making the new National Court responsive to policy directions from the Supreme Court through rules that the Supreme Court could issue to govern procedures and criteria of certification in the National Court, and since the hierarchical position of the Supreme Court at the head of the federal judiciary would remain undisturbed. Means of communicating relevant attitudes of the Supreme Court exist now and would remain available. . . . And the communications would be heeded." A. BICKEL, *supra* note 7, at 33. But see Poe, Schmidt & Whalen, *supra* note 7, at 851.

196. The failure of the Freund Study Group to explain thoroughly the specific ways the Supreme Court would use the rule-making power, as well as the other methods of communication, was a major defect in the proposal and the cause of much of the criticism directed against it.

Despite the precedents of congressional willingness to entrust finality to lower courts, it has been urged that an NCA, because of its ability to make final decisions of national law, would run afoul of the Supremacy Clause.<sup>197</sup> That clause, which commands that the Constitution shall be the supreme law of the land, has been interpreted as necessarily investing the power in the Supreme Court to guarantee constitutional dominance and to provide a uniform body of federal law in the federal court system.<sup>198</sup> The criticism of the NCA stems from its ability, along with the Supreme Court, to make national law, leading to the possibility of two laws "made in pursuance of the Constitution" that in a sense compete for supremacy. Despite some ambiguity in the Constitutional Convention regarding the precise way to enforce the Supremacy Clause,<sup>199</sup> the Supreme Court from a very early day assumed the power to "state what the law is."<sup>200</sup> More specifically, the Court has held that the Supremacy Clause is "clothed with judicial power" and requires not only the settlement of constitutional questions but the maintenance of a singular interpretation of the Constitution and laws of the United States.<sup>201</sup> The Court has thus cast the judicial branch in the role of ultimate arbiter of the national law and of disputes regarding constitutionality. In regard to a National Court of Appeals, it must be determined whether the Supremacy Clause demands that the Supreme Court act as its *sole* enforcement agent. While the Supreme Court has undoubtedly viewed itself as the ultimate mechanism by which the Clause is enforced, it has used, as in *Marbury*, more general language regarding the duty of the "judiciary" and the "judicial branch" to secure the supremacy of the Constitution and to say what the law is. The difference in terminology, essentially one more of form than substance, does place a different perspective on the Supremacy Clause problem. The importance of the Clause lies not in any intended Supreme Court role but rather, as its own language clearly states, in ensuring the supremacy of the Constitution. The Supreme Court has assumed the duty of enforcing the Clause, but to use the constitutional language to invest power in the Court is to miss the point. The Clause requires constitutional preeminence, and the

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197. See, e.g., Black, *supra* note 7, at 885; Gressman I, *supra* note 7, at 956; Poe, Schmidt & Whalen, *supra* note 7, at 855.

198. See Ratner, *supra* note 12, at 160-65.

199. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20-22. See generally A. MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 18-20, 47-49 (1962).

200. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803):

201. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517 (1858). See Ratner, *supra* note 12, at 166-68.

Supreme Court has taken the position that the courts will enforce that command, but it is the resultant supremacy, the power of the Court, that is most important. There is arguably no great constitutional difficulty if the Supreme Court alone does not make all the decisions so long as the supremacy of the Constitution and the laws made under it are maintained. The Freund Study Group's NCA, with its provisions for Supreme Court direction and superintendence, would not so unduly restrict the Supreme Court's unifying role that the supremacy of the law would be threatened by two divergent constitutional interpretations. Under that plan, the High Court would maintain its function as the ultimate arbiter.<sup>202</sup>

The Hruska Commission's "reference jurisdiction" also passes constitutional muster. The critics contend that once the Supreme Court accepts a case for review it may not delegate any portion of the decision-making process to another court without destroying its required "oneness."<sup>203</sup> In the first place, the ability of litigants to seek certiorari from the NCA to the Supreme Court in the referred cases counters the contention that reference jurisdiction can lead to two courts of shared jurisdiction, as might be the case if the Supreme Court merely passed along half of its business to the NCA for equally binding decisions. Gressman argues that the constitutional convention's rejection of the provision allowing "assignment of Supreme Court jurisdiction precludes the reference portion of the Hruska NCA jurisdiction."<sup>204</sup> The wisdom of placing too much emphasis on language rejected by the convention delegates is open to question, and, in any case, "assignment" and "reference" may not even be analogous. In terms of a more contemporary understanding, it is significant that only a presidential veto in 1892 prevented the enactment of a bill which would have alleviated a Supreme Court backlog by assigning its arrearages to the circuit courts.<sup>205</sup> That legislation was rejected by President Harrison because it allowed the Supreme Court too broad a review power in criminal cases, which were just then beginning to be heard in that Court. Harrison also desired that suits brought under the Indian Depredations Act be given

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202. If one accepts the contentions of both the Freund and Hruska Reports regarding the inability of the Supreme Court to resolve lower court conflicts, both NCA proposals might be viewed as furthering the actual intent of the Supremacy Clause. Each would, by eliminating many present inconsistencies in the national law, further the supremacy of that law without emasculating the ability of the Supreme Court to make changes in its determinations.

203. See *Hearings II*, *supra* note 8, at 1319-24.

204. *Id.* at 1321.

205. 23 CONG. REC. 5116 (1892).

a direct route of appeal to the Supreme Court.<sup>206</sup> However, Harrison raised no constitutional objections and none were mentioned in the debates on the bill which was, of course, never passed upon by the courts. Therefore, the Hruska NCA's provision for review of referred cases alleviates the primary constitutional objection of having two courts of practically concurrent jurisdiction.

In conclusion, both plans for a National Court of Appeals appear to fit within the "one supreme Court" language of article III. Elimination of total docket control by the removal of the screening function under the Freund proposals is primarily a policy issue because discretionary review by writ of certiorari is not a constitutional principle but only a tool relatively recently given the Court by Congress. The same is true of allowing other federal courts to make binding decisions without Supreme Court review, again under the Freund proposals. Such a policy reflects a return to the early days of the federal judicial system and offends no constitutional principle, especially when the Court retains a mechanism by which it can exert its own policy prerogatives. Also, the Supremacy Clause was not aimed at the intramural applications of the national law but at state-federal interactions, and does not require the Supreme Court to be its exclusive monitor. Finally, giving the Supreme Court the capability of referring its cases to an NCA under the Hruska plan enables that court to be a tribunal which will aid the Supreme Court in utilizing its jurisdiction rather than one which would simply share the High Court's duties and thus its identity.

## B. An "Inferior" Court?

The Constitution, in both articles I<sup>207</sup> and III,<sup>208</sup> twice mentions the congressional power to create inferior courts, and in article I specifically speaks of "tribunals inferior to the supreme Court." One of the important constitutional questions in conjunction with the creation of a National Court of Appeals is whether such a court would truly be "inferior" and thus within the constitutional ambit of congressional powers.<sup>209</sup> The most significant problem in this regard is definitional; namely, ascertaining the intended relationship between the federal courts that will make some "inferior" and one "supreme." Since the

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206. F. FRANKFURTER & J. LANDIS, *supra* note 49, at 112.

207. U.S. CONST. art. I, § 8, cl. 9: "To constitute Tribunals inferior to the supreme Court." (The clause is one in the list of congressional powers).

208. *Id.* at art. III, § 1: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

209. See *National Court*, *supra* note 7, at 290-312.

precise meaning of the term "inferior" was not discussed at either the constitutional convention or the state ratifying conventions, two other indicators, the contemporary accepted meaning of the term in the 1700's and the embodiment of it in the Judiciary Act of 1789, lend the most important insights.

There is some indication that common law courts, which were classified as inferior and superior, were so categorized on a strictly jurisdictional basis.<sup>210</sup> The courts having the broadest jurisdiction were superior while those with limited jurisdiction were considered inferior. Most inferior courts were also subject to some sort of supervision, but not necessarily to review.<sup>211</sup> It can be argued that the distinctions were carried over into the new American court plan, and that inferior courts would be those with limited jurisdiction, usually subject to some supervision. There was, however, no indication that the framers were working to copy a common law framework.<sup>212</sup> The colonial courts provide little guidance due to the disparate nature of each separate system. Some courts were designated as inferior or superior, but the functions and jurisdiction of each varied from place to place.<sup>213</sup> The early American experience and the history of the common law do suggest that inferior courts were subordinate in some fashion, usually by the fact of at least a limited scope of review, but are vague in terms of any specific required relationship between the superior and inferior levels of courts.

The Act of 1789 provides more assistance in ascertaining the meaning of "inferior." As noted earlier, the Act set up the Supreme Court, three circuit courts and thirteen district courts. The lower courts, presumably inferior, were of limited jurisdiction and subject to Supreme Court review in some classes of cases. Judging from the specifics of that plan, "inferior" takes on the meaning alluded to by Alex-

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210. See generally M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 319-20 (1880) [hereinafter cited as BIGELOW]; 3 W. BLACKSTONE, COMMENTARIES \*37-\*59 [hereinafter cited as BLACKSTONE].

211. 3 BLACKSTONE, *supra* note 210, at \*44, n.19, \*36. See also *National Court*, *supra* note 7, at 293.

212. Beyond incorporating any abstract legal principles into the plans for a new judiciary, the framers seemed most concerned with countering the bad experience under the Articles of Confederation. This was especially true in regard to arbitration between states and the need for a national appellate court to handle the increasing number of admiralty cases. Frank, *supra* note 30, at 8-9; Swindler, *supra* note 53, at 511-14.

213. See W. NELSON, THE AMERICANIZATION OF THE COMMON LAW 13-63 (1975); R. POUND, ORGANIZATION OF COURTS 26-90 (1940). The concept of appeal was common in the colonies, although there was no rigid separation of powers and the appeal often ended with the governor or legislature. There were systems of courts through which appeals could progress, but there was no labeling of such courts as inferior or superior. See Frank, *supra* note 30, at 4-7; *National Court*, *supra* note 7, at 295; Swindler, *supra* note 53, at 504-07.

ander Hamilton in Federalist 81, namely, that of a court possessed of a "subordinate" relationship.<sup>214</sup> Hamilton had spoken of inferior courts as tribunals subordinate to the supreme tribunal, and the Act did, by its limited provisions for review, establish a system in which the lower courts were subordinate. This relationship did not, however, encompass total reviewability. In that regard, the 1789 structure resembled common law inferior courts, but analogies between the systems suffer from the relatively strict, hierarchical design of the American courts with their one supreme tribunal, a feature unknown at common law.<sup>215</sup> The most that can be gained from the 1789 Act is the knowledge that inferior courts definitely did include courts of limited jurisdiction subject to at least partial Supreme Court review.

The constitutional meaning of "inferior" has been discussed by the Supreme Court in a series of disputes over circuit court jurisdiction. Chief Justice Oliver Ellsworth, in *Turner v. Bank of North America*,<sup>216</sup> stated that inferior courts as described in the Constitution were distinct from the common law inferior courts. After noting this distinction, Ellsworth stated that circuit courts were inferior courts in addition to being courts of limited jurisdiction.<sup>217</sup> Ellsworth said nothing of inferiority requiring appellate subordination. It was not until 1809 that Chief Justice John Marshall explicitly drew that conclusion.

In *Kempe's Lessee v. Kennedy*,<sup>218</sup> Marshall stated that "[a]ll courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried, . . ."<sup>219</sup> thus strongly implying that appellate inferiority was a necessary component of the general concept of inferior courts. The next year, in *Durousseau v. United States*,<sup>220</sup> Marshall was forced to explain a statute that established a new district court without any provision for Supreme Court review of that court's actions. Marshall assumed that Congress intended that the review mechanics for the new court would match those of the existing district courts; otherwise, he said "the court . . . would, in fact, be a supreme court."<sup>221</sup> On the surface, this language would

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214. THE FEDERALIST NO. 81, *supra* note 25, at 505-06.

215. See BIGELOW, *supra* note 210, at 19-146. The common law courts did have inferior and superior elements, but there was no one court in that system that was supreme over all others, although the House of Lords existed as titular head of the system. *Id.* See also *National Court*, *supra* note 7, at 295.

216. 4 U.S. (4 Dall.) 7 (1799).

217. *Id.* at 11.

218. 9 U.S. (5 Cranch) 173 (1809).

219. *Id.* at 185.

220. 10 U.S. (6 Cranch) 307 (1810).

221. *Id.* at 318.



seem to equate inferiority with an ability to be reviewed, although Marshall did not state that such would be required in the face of a direct congressional command to the contrary.<sup>222</sup> On the other hand, it has been argued that Marshall's language about a court "otherwise being supreme" does mandate appellate inferiority as a condition necessary to being an inferior court.<sup>223</sup>

As is also true regarding the "exceptions and regulations" clause, the actual boundaries or limitations on the congressional ability to create inferior courts are not a subject of easy delineation due to the fact that Congress has never made any extraordinary or even novel attempts to test the extent of its constitutional power. There are no judicial statements bearing directly on the subject because Congress has so seldom deviated from the original court plan that no one has had cause to test the scope of the power. While Marshall in *Durousseau* may have implied that appellate inferiority was an essential element of the lower federal courts, the issue was not specifically addressed, nor has any later court considered the question. Other sources, however, indicate that at least some appellate inferiority was a generally accepted characteristic of the United States federal courts. The Act of 1789 provided a limited appellate jurisdiction, and the most important early Supreme Court Chief Justice, John Marshall, agreed. Despite these indications, the actual elements of appellate inferiority remain undefined, and those elements pose important problems in evaluating plans for a National Court of Appeals.

It seems clear that the Hruska NCA would have little trouble with the "inferior" court provision since NCA decisions would be reviewable in the Supreme Court by writ of certiorari. The Freund Court presents more substantial problems in that none of its decisions on the merits would be reviewable by the Supreme Court.<sup>224</sup> The resolution of the inferiority problem thus hinges on the classification of the process of referring writs of certiorari. The potential defect of a lack of appellate inferiority could be cured by making all NCA decisions on the merits appealable by writ of certiorari to the Supreme Court. This would not pose a substantial problem in light of the Study Group's expectation that the number of cases so decided would be fairly small.<sup>225</sup> Such a provision would parallel the clear-cut area for review possessed by the earlier "inferior" federal courts. Regardless of such an

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222. *Id.* at 316-18.

223. *See National Court*, *supra* note 7, at 303.

224. FREUND REPORT, *supra* note 1, at 21.

225. *Id.*

amendment to the Freund Report, a strong case can be made for the position that the NCA function of screening certiorari petitions for Supreme Court review makes it sufficiently inferior to pass any constitutional test.

The Freund National Court of Appeals would be expected to certify 400-500 writs of certiorari from which the Supreme Court would choose cases for decision on the merits.<sup>226</sup> Since the NCA would be offering a wide category of cases to the Supreme Court for review while not explicitly defining any areas of decision, and since the Supreme Court would be free both to deal with the forwarded writs in any fashion the justices desired and to state guidelines for the NCA selection process, it seems that the NCA could comport with the Hamiltonian view of inferiority, which is exemplified by a subordinate relationship. An NCA that simply screened cases for ultimate Supreme Court disposition would be subordinate since the Supreme Court would continue to make the binding, final decisions of national law, would retain the power to reject cases it did not wish to hear, would continue to be the final arbiter of important constitutional disputes, and would by virtue of its rule-making power exert its policy directives on the "lower" NCA. A properly functioning NCA would assume none of these functions. It would simply make final decisions in areas deemed unworthy of Supreme Court attention and forward broad classes of legitimate writs of certiorari to the Supreme Court. The High Court would retain its ultimate authority; the NCA would simply be a screening agent. Such an NCA could in no way be deemed an equal of the Supreme Court, and its functions seem clearly to be subordinate. Although the Supreme Court would not be able to review that small category of final NCA decisions, it would continually be reviewing the broad classification process in the sense that it would be passing judgment on cases the lower court thought worthy of its attention. Such a view arguably satisfies the presumed requirement of appellate inferiority. All of the functions of the Freund NCA would be those of a subordinate, inferior court, subject in practical consequence to appellate review by the Supreme Court.

The only significant trouble with this National Court of Appeals arises from a consideration of the court's negative potential. A deep philosophical dispute with the Supreme Court might cause the NCA to refuse to give the Supreme Court access to an area by either continually denying petitions for review or by making its own final decisions in

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226. *Id.* at 21-22.

very important legal areas. Under the Freund proposal, the Supreme Court would be powerless to act and the NCA might very well become a supreme court in its own right because of its ability authoritatively to define national law in any area it desired. However, the National Court would not be designed to so operate; the very purpose of the NCA forwarding 400-500 cases, from which approximately 150 decisions would be made, would be to provide the Supreme Court with a wide berth of discretion, and such a purpose would undoubtedly be established in the NCA statute. It would also be alleviated by the Supreme Court's ability to make policy directives. Yet, if this negative potential were truly feared, the problem could be partially avoided by inserting a provision for review of all NCA final decisions, ensuring no final NCA opinions contrary to Supreme Court intentions. Of course, even with such a provision, the denials of certiorari would still be final, and this would present the problem of the Supreme Court being unable to fully control its docket. It is at this point, though, that the lessons of the history of the federal judiciary must overcome any recently shaped conceptions about the functions and characteristics of the Supreme Court. The possibility of the Supreme Court not being able to rectify every lower court error or hear every case in which it feels a need to make a decision was a practical reality for the first 100 years of the judicial system. It was not until relatively recent times that the Supreme Court attained the wide scope of jurisdiction and broad docket discretion which it now enjoys. The propriety of the policy alternatives must be kept a separate issue; it should be remembered that a Supreme Court without full control over the policy directions of its caseload is not without historical precedent. A National Court of Appeals which has the potential for eliminating categories of cases from Supreme Court consideration may not be the most intelligent policy choice available to Congress, but it does not offend the Constitution. A National Court of Appeals, making some decisions over which the Supreme Court would have no control, would still qualify as an inferior court by maintaining a subordinate relationship with the Supreme Court, a relationship often characterized by some form of reviewability or supervision. Such characteristics are present in both the Freund and Hruska plans, and although the inferiority of the Freund NCA would be fortified by a provision allowing for review by certiorari from all final National Court opinions, this is not constitutionally required.

### C. The Exceptions and Regulations Clause

*Section 2.* (2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations, as the Congress shall make.<sup>227</sup>

Considerations of the National Court of Appeals complying with constitutional requirements of inferior courts or "one" Supreme Court are in a sense only peripheral to the larger, central question of the scope of the congressional power to mold and alter the federal courts. Although the constitutional language seems to give Congress plenary authority, scholars have inferred limitations on the legislative prerogatives to deal with the judiciary.<sup>228</sup> In connection with a National Court of Appeals, it has been argued that the congressional power may not be used to disrupt "traditional Supreme Court functions" or the "role of the Court in the constitutional plan,"<sup>229</sup> and that any such disturbances created by an NCA would thus be the result of Congress overstepping its authority. If the clause is given a plenary interpretation, the power to create a National Court in conformity with the other constitutional requirements will not be a serious problem.

As was noted previously, the delegates to the constitutional convention, while not expressly debating the "exceptions and regulations" clause, did reject two provisions that arguably would have broadened the scope of congressional power over the judiciary.<sup>230</sup> The first, which provided that "the judicial power shall be exercised in such manner as the legislature shall direct," was rejected by the Committee on Detail as an alternative to the exceptions clause. The second, which would have allowed the legislature to assign any part of the Supreme Court's jurisdiction to any of the inferior courts, was originally drafted as an addendum to the present clause, but rejected by a vote of the whole convention. Both changes were made without debate or explanation, but Gressman urges that they specifically undermine the use of the exceptions clause as authority for jurisdictional alterations such as the Freund or Hruska proposals for an NCA.<sup>231</sup>

Apart from any consideration of the broad power assumed by or

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227. U.S. CONST. art. III, § 2, cl. 2.

228. See Ratner, *supra* note 12, at 157-60. See generally Hart, *supra* note 12.

229. This argument builds on the limitations formulated by Hart and Ratner. See Gressman *I*, *supra* note 7, at 964-69; *National Court*, *supra* note 7, at 308-09.

230. See notes 14-19 and accompanying text *supra*.

231. Gressman *I*, *supra* note 7, at 964-69; *Hearings II*, *supra* note 8, at 1320-21.

acceded to Congress under the Clause,<sup>232</sup> the convention's language alterations are a fragile basis on which to imply specific limitations of congressional power. The leap from rejection of alternate language to embodiment of constitutional prohibition is one not easily made, and, lacking an explanation as to why the substitutions and rejections occurred, one that probably should not be made at all. Given the complex and often confused amendment process, more specific evidence of an intended limitation is necessary before the language changes should be used as strictures on congressional power. While rejection of jurisdictional assignment or a limitation on the general congressional power over the courts may have been contemplated, the delegates could also have had several other purposes in mind. The first clause, which would seemingly have given Congress unbridled discretion over the judicial power, may have been thought to allow interference with the Court's original jurisdiction. The delegates could also have felt that an assignment provision was unnecessary in light of the Supreme Court's anticipated workload, or that, given the part of the clause authorizing exceptions and regulations, any further delegation to Congress would be either unnecessary or redundant.<sup>233</sup> The evidence needed to imply intent to restrict congressional power in this area is simply not available, and it is especially necessary when the language actually adopted seems to imply no limitations.<sup>234</sup>

The Constitution's advocates were required to defend the clause in the Virginia ratifying convention. The meaning of the term "exceptions" was a particular issue, and John Marshall gave support to an expansive view of the power when he said: "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."<sup>235</sup> William Randolph, another advocate of the new plan, also spoke to a broad meaning of the clause, saying: "It would be proper here to refer to anything that could be understood in the federal court. They [Congress]

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232. See note 249 *infra*.

233. See HART & WECHSLER, *supra* note 18, at 12-13 n.46, where the language change is deemed "largely rhetorical."

234. See Bice, *An Essay Review of Congress v. Supreme Court*, 44 SO. CAL. L. REV. 499 (1971). Criticizing the mode of analysis which relies essentially on original intent, Bice says: "Many of these arrangements may be merely the means to the ends the society seeks to achieve by adopting the constitutional system. As conditions change, some of those means may become incapable of achieving society's goals, and, thus, should give way to arrangements which were not considered or even rejected when the basic document was drafted."

*Id.* at 510 (footnotes omitted).

235. 3 ELLIOT'S DEBATES, *supra* note 14, at 560.

may except generally both as to law and fact, or they may except as to the law only, or fact only.”<sup>236</sup> As Van Alstyne points out, the many scholarly investigations of the origins of the exceptions and regulations clause do show that the founders generally had several uses and purposes in mind when they drafted the language, but there is no indication that those purposes would mark the limitations of the power.<sup>237</sup> Federalists Marshall and Randolph showed by their remarks that a broader interpretation was at least discussed and probably had other support. Since Congress attempted nothing particularly drastic after constructing the original court system, however, the framers were never required to define the limits of the power.

Unlike the provisions for “one supreme Court” and “other inferior courts,” the exceptions and regulations clause has been the subject of substantial judicial discussion. The most significant case in which the power was discussed is *Ex parte McCordle*.<sup>238</sup> That controversy arose in 1868 when McCordle, a newspaper editor in Mississippi, was convicted by a military tribunal for an offense under the Reconstruction Acts. McCordle’s writ of habeas corpus was rejected by the circuit court, and McCordle petitioned the Supreme Court for review of that decision under a 1867 provision giving the Court the power to review habeas corpus cases.<sup>239</sup> The Court heard the case in 1868 and took it under advisement due to the absence of Chief Justice Chase, who was then presiding over President Johnson’s impeachment trial. Before the Court could issue an opinion, Congress, fearful that the Court might utilize the occasion to declare the Reconstruction Acts unconstitutional, repealed the 1867 legislation<sup>240</sup> to remove the Court’s jurisdiction and require it to dismiss the case. Chase, speaking for a unanimous court, stated:

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause.<sup>241</sup>

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236. *Id.* at 572.

237. Van Alstyne, *supra* note 12, at 261.

238. 74 U.S. (7 Wall.) 506 (1869).

239. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

240. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

241. 74 U.S. (7 Wall.) at 514.

The Supreme Court, by thus acceding to the alteration of its jurisdiction, seemingly constitutionalized the principle of broad congressional power utilized through the exceptions and regulations clause.

*McCardle* has been anything but a popular decision.<sup>242</sup> The Supreme Court could have heard the case via a route offered in the 1789 Act rather than simply looking at the power given by Congress in 1867,<sup>243</sup> and the Court did use very broad language to deal with what could have been a very narrow question. More specifically, there was no need to discuss the "exceptions and regulations" power because Congress in this instance had only withdrawn a route of review previously extended. In other words, it can be argued that the case did not involve a true exception to the Supreme Court's appellate jurisdiction but rather only a removal of one route of review, and thus that the Supreme Court did not need to discuss the ability of Congress to make exceptions.<sup>244</sup>

Despite these critical reevaluations of the decision, the *McCardle* Court did choose to discuss the exceptions power and did give it a very broad interpretation. In regard to that holding, *McCardle* was hardly an historical anomaly, and its broad language has continued to be cited with approval. In a series of earlier cases, Chief Justices Marshall, Ellsworth and Taney, while claiming that the principle of appellate jurisdiction has its basis in the Constitution, noted also that the particulars of the power are the absolute and total responsibility of Congress.<sup>245</sup> So, in an historical sense, *McCardle* was only the reiteration of a previously held judicial principle. Cases subsequent to *McCardle* follow the pattern, citing the case to bolster very broad recognitions of congressional power to alter both the structure and jurisdiction of federal courts.<sup>246</sup>

242. For critical discussions of *McCardle*, see R. BERGER, CONGRESS V. THE SUPREME COURT 286-89 (1969); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238, 246-51 (1970); Hart, *supra* note 12, at 1364-65; Lenoir, *supra* note 12, at 20-30; Ratner, *supra* note 12, at 160-67.

243. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

244. See Van Alstyne, *supra* note 12, at 244-48.

245. See *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119-20 (1847); *United States v. More*, 7 U.S. (3 Cranch) 159-73 (1805); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 320, 327 (1796).

246. See, e.g., *Chandler v. Judicial Council*, 398 U.S. 74, 111 (1970) (Harlan, J., concurring); *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring); *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962). Dissenting in *Glidden*, Justice Douglas stated that it was doubtful that *McCardle* could command a "contemporary majority," *id.* at 605 n.11, but concurring in the later *Flast* decision, Justice Douglas stated: "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Article III. See *Ex parte McCardle*. . . ." 392 U.S. at 109. The lower federal courts have continued to cite *McCardle* for

The concept of an unchecked Congress in the field of appellate jurisdiction has spurred a search for ways in which that power can be limited. Professors Ratner and Hart concluded that congressional limitations of appellate jurisdiction must stop short of destroying the "Court's role in the constitutional plan."<sup>247</sup> The Court's role would thus be exemplified by the ability (1) to declare the supreme law of the land; (2) to provide for the ultimate resolution of inconsistent lower court interpretations of federal law; and (3) to ensure the supremacy of federal law over state law.<sup>248</sup> However, while the preservation of such a Supreme Court role may well be a valid policy alternative, there is no specific judicial language supporting a theory that Congress is so limited in exercising its powers. On the contrary, the Supreme Court has often seemed to embrace the concept that the congressional role in this area is without significant strictures.<sup>249</sup>

Apart from any considerations of "role preservation," more definitive limitations on this congressional power may be found in other language of the Constitution. For instance, Congress may except from and regulate the appellate jurisdiction, but it may not create more than one Supreme Court while so doing. More important, as Van Alstyne points out, the Fifth Amendment guarantees of equal protection and due process may not be impaired by any congressional exceptions and regula-

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the proposition of broad congressional power through the exceptions and regulations clause. *See, e.g.,* *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 701 (6th Cir. 1976); *Gamble v. Central of Ga. Ry. Co.*, 486 F.2d 781, 785 (5th Cir. 1973); *Drake v. Selective Serv. Local Bd. No. 50*, 443 F.2d 101, 102 (8th Cir. 1971); *Hunt v. Local Bd. No. 197*, 438 F.2d 1128, 1135-36 (3rd Cir. 1975).

247. Hart, *supra* note 12, at 1364-65; Ratner, *supra* note 12, at 201-02.

248. Ratner, *supra* note 12, at 160-67.

249. *See, e.g., Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865): "In order to create such appellate jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Earlier, Justice Daniel had stated that the judicial power, except for original jurisdiction, is dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals [inferior to the Supreme Court] for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

*Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845). In *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847), Chief Justice Taney stated "[b]y the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." *See also* *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting): "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*. *Ex parte McCordle*." But *see* Ratner, *supra* note 12, at 168-83.



tions.<sup>250</sup> Van Alstyne argues that that the due process clause requires a judicial hearing conforming to Supreme Court requisites of fairness; but that Congress need not provide for a hearing or appeal to the Supreme Court itself.<sup>251</sup>

Nearly all of the commentary concerning the limits of the exceptions and regulations clause and the continued validity of *Ex parte McCordle* were the result of various congressional threats to the Supreme Court's subject matter jurisdiction.<sup>252</sup> When compared to those proposals, such as cutting off review of all apportionment decisions, the suggestions for a National Court of Appeals pale in significance. Regardless of which interpretation of *McCordle* is accepted, neither NCA proposal would be outside the congressional scope of power. Both plans would comport with the rest of the Constitution and both would also seem to comply with Ratner's description of the proper Supreme Court role in the governmental plan, since the supremacy of the federal law would not be threatened and the ultimate resolution of lower court conflicts would actually be increased. Given the broad contours consistently attributed to Congress in this area by the Supreme Court, the creation of either form of a National Court of Appeals would certainly be a permissible regulation of appellate jurisdiction and not outside the bounds of congressional authority. The exceptions and regulations power seems much broader than it need be to sustain this sort of legislation, and the exact limits of the authority, if any, may not be determined until a much more drastic reform is brought into question. It is enough to note here that the long string of precedents for a broad interpretation of congressional authority would sustain these types of NCA's and perhaps other, more extraordinary reforms as well.

## Conclusion

The various proposals for the creation of a National Court of Appeals have stimulated much discussion, most of which has assessed the validity of the need for an NCA, the propriety of that type of structural reform and the proper role of the judiciary in American politics. The entire sequence is, of course, one that has been witnessed many times before. The debates over circuit riding, the new circuit court system and the implementation of discretionary docket control all involved as-

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250. Van Alstyne, *supra* note 12, at 268.

251. *Id.* at 268-69.

252. See generally, Hart, *supra* note 12; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961).

sessments of the judicial workload and reflections on judicial function and structure. All were marked by a general congressional procrastination, and all eventually did require at least some change in conceptions about the role of the courts. The demise of circuit riding forced abandonment of the notion that judges must obtain a feel for local law before making intelligent determinations of national law. The Circuit Act of 1891 required an even more fundamental change, as cases that had previously been entitled to adjudication in the Supreme Court were given to the new circuit courts for final judgment, subject only to discretionary Supreme Court review. The Judges' Bill of 1925 expanded the concept of discretionary review begun by the Circuit Act, and thus further changed the role of the Supreme Court by endowing it with a selective decision-making power rather than the more basic duty of deciding all cases that properly gravitate through the federal court system.

Without evaluating the status of the current Supreme Court caseload "crisis," the similarities to previous debates are very evident. Although there is a general consensus that the workload presents some problem, major disagreements continue regarding its relative seriousness, and thus the debate takes place with no great sense of urgency. The Freund and Hruska proposals have been criticized because they would deprive the Supreme Court of its essential functions and unacceptably alter the respective roles of the courts within the federal system. This latest debate, however, has produced a new twist in its contention that the Freund and Hruska proposals would also be unconstitutional. A claim of unconstitutionality raises important questions about the possible limitations on congressional ability to make both structural and jurisdictional changes in the federal court system, and, if the claim is valid, place significant obstacles in the way of any reform of an overburdened judiciary.

Viewed against the historical development of the federal judiciary and the actual constitutional requirements for a Supreme Court, though, this contention seems more analogous to the prior policy concerns over judicial function than to any real constitutional claims, and both the Freund and Hruska proposals would thus appear to be within the constitutional framework. The Constitution does provide that there be "one supreme Court" and other "inferior Courts" as Congress sees fit to establish. It also gives Congress the power to make exceptions to and regulations of the Supreme Court's appellate jurisdiction. That latter power would be the basis for any congressional creation of an NCA, and although the extent of power given under the exceptions clause is

an unsettled question, this type of reform would not appear to test its outer limits. For instance, under the current NCA proposals, there would be no deprivation of specific jurisdictional powers, no emasculation of current Supreme Court functions and no attempt by Congress to control the outcome of certain types of cases—all examples of the type of situation that defenders of the Court might claim are not allowed by a “proper” reading of the constitutional language. There is instead a congressional attempt, regardless of its logical soundness, to improve judicial administration by changing the structure of the courts. Such a plan would seem well within the exceptions power providing that the reform as adopted respects other constitutional provisions such as the requirement of “one supreme Court.” Considerations of an NCA in light of the “one supreme Court” and other “inferior Courts” language are basically interrelated due to the fact that the concept of a non-supreme court would seem to include the concept of inferiority. In any case, it seems clear that any plan for an NCA that allows Supreme Court review or supervision would require the NCA to be an inferior court since the NCA would be subject, in some degree, to the control of another tribunal. It also seems clear that any such plan would not permit the new tribunal to be supreme, since the original Supreme Court would continue to be the ultimate authority, and while perhaps not reviewing every case arising from the lower federal courts, would still exert its own political and judicial preferences.

Apart from these specific arguments, the general contention that the one Supreme Court concept is violated by any deprivation of total Supreme Court control over the entire federal court system, aside from not being able to command much historical support, also seems to suffer from a type of structural tunnel vision. The ultimate concern in regard to the federal judiciary should not be the precise role of the Supreme Court in the judicial framework but the health and status of the national law. Although it is desirable that the Supreme Court possess certain capabilities in order to maintain a meaningful role in the system, the particular powers of the Court should not be the central concern. The framers provided for one Supreme Court because of their experience with the Articles of Confederation and the perceived need for a tribunal of national authority to ultimately settle questions of national importance. The intention was not that the one Supreme Court be possessed of certain powers so as to maintain a coherent national law, but that the national law be so maintained by the *whole* federal judiciary. So long as that goal is accomplished, and the judicial needs of the country are properly served, the essential constitutional mandate

will be satisfied. It is true that maintenance of the national law requires a Supreme Court that is generally capable of overseeing the bounds of the system, but the Supreme Court is not required to see every petition for review or make every final decision. Simply stated, the proper focus of constitutional inquiry should be more on the state of the law than on the powers of any specific tribunal. The state of that law relies heavily on the abilities of the Supreme Court to supervise generally, but a plan that allows that Court a more detached control and that also, by its creation of an expanded appellate capacity, adds a larger degree of certainty to the national law would seem to command a large degree of constitutional authority. The most basic reason for giving Congress power over the Supreme Court's appellate jurisdiction was to ensure the maintenance of this legal stability, allowing a structuring of the courts best suited for contemporary judicial needs. Although the founding fathers could hardly have been expected to anticipate the present day complexities of the inferior federal court system, Alexander Hamilton did speak to the congressional authority to promote the maintenance of the principles underlying the new judicial system:

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to provide such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well informed mind, as a solid objection to a general principle which is calculated to avoid general mischiefs and to obtain general advantages.<sup>253</sup>

It would be rather anomalous if at the same time the current docket situation deteriorated to the point where the Supreme Court was beset by an avalanche of petitions for review, the lower courts produced an ever-increasing number of conflicting decisions and relief proposals such as an NCA were rejected because they diminished Supreme Court control and usurped contemporary Supreme Court functions. The strange result would be to cling to a "constitutional" conception of "one supreme Court" while tolerating a situation quite similar to the very scenario the framers had sought to avoid.

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253. THE FEDERALIST NO. 80, *supra* note 25, at 501.

